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NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM T. WULIGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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12 pp

QUESTIONS PRESENTED FOR REVIEW

1. In order to avoid an inevitable chilling effect on the bar, the judiciary and litigants' rights to zealous advocacy and the effective assistance of counsel, must 18 U.S.C. § 2511(1)(d) be construed as providing an attorney a qualified immunity from criminal prosecution where that attorney's use of information derived from a wire interception is limited solely to a good faith exploration of issues in formal judicial proceedings for purposes of creating a record upon which the trial court may subsequently determine the issue of the admissibility of such information and is further based on the attorney's good faith belief that such information has been lawfully obtained or is lawfully admissible?

2. Does it constitute a crime for an attorney to use the contents of a wire interception for purposes of impeaching an opposing party upon cross-examination during the course of formal legal proceedings?

3. Following an agreement between counsel allowing the limited use of the contents of a wire interception for purposes of discovery and an anticipated pre-trial ruling on the issue of admissibility, and following a party's waiver of the right to contest the admissibility thereof, does an attorney's use of such information constitute a crime, absent a motion to suppress or for a protective order by the other party?

4. Does it constitute a crime for an attorney to use the contents of a wire communication of litigant-wife which was intercepted by client-husband by placing an interception device on an extension line in the marital home while the parties were residing together as husband and wife?

5. Is an attorney entitled to a complete good faith defense under the provisions of 18 U.S.C. §§ 2515, 1518(10) and 2520(d)(1), where he uses the contents of an unlawful wire interception in good faith conformity with his State-created professional ethical obligations to his client, where the subject of the interception both expressly consented to such use and affirmatively waived the right to contest such use, where the attorney's use is consistent with precedent of courts of the State where such use occurs and is consistent with precedent set forth by federal courts in Circuits other than the one in which his State is situated?

6. Must 18 U.S.C. § 2510, et seq., be construed in such a way as to avoid an unconstitutional intrusion by Congress and the federal executive branch upon matters constitutionally reserved to the States and upon fundamental rights which are essential to the

separation of powers, the independence of the judiciary and the Bar and the viability of the adversary system?

7. Without violating fundamental aspects of due process of law, can an attorney be subject to criminal prosecution and deprived of defenses thereto on the basis of newly created law announced by the reviewing court and where the newly announced judicial interpretation is contrary to the law which was existing in other jurisdictions at the time of the charged offense?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND THE FACTS 3

REASONS FOR GRANTING THIS WRIT 18

I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER, IN ORDER TO AVOID AN INEVITABLE CHILLING EFFECT ON THE BAR, THE JUDICIARY AND CLIENTS' RIGHTS TO ZEALOUS ADVOCACY, TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (18 U.S.C. §§ 2510, ET SEQ.) MUST BE CONSTRUED AS PROVIDING A NARROWLY DEFINED CRIMINAL IMMUNITY FOR THOSE INDIVIDUALS WITHIN THE ADVERSARY SYSTEM WHO UTILIZE THE CONTENTS OF WIRE INTERCEPTS BASED UPON THE REASONABLE, GOOD FAITH POSITION THAT SUCH INFORMATION HAS BEEN LAWFULLY OBTAINED OR IS LAWFULLY ADMISSIBLE. 18

II. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE FIRST, FIFTH, SEVENTH AND NINTH CIRCUITS IN REFUSING TO RECOGNIZE THAT IT IS LAWFUL TO USE THE CONTENTS OF EVEN AN UNLAWFUL

WIRE INTERCEPTION FOR PURPOSES OF IMPEACHING AN OPPOSING PARTY DURING THE COURSE OF FORMAL LEGAL PROCEEDINGS. 32

III. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE SECOND, FOURTH, EIGHTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS IN REFUSING TO RECOGNIZE THAT IT IS NOT UNLAWFUL FOR AN ATTORNEY TO USE THE CONTENTS OF EVEN AN UNLAWFUL WIRE INTERCEPTION DURING LEGAL PROCEEDINGS AFTER THE VICTIM OF THE INTERCEPTION HAS EXPRESSLY CONSENTED TO SUCH USE AND/OR HAS UNCONTROVERTEDLY WAIVED HER RIGHT TO CONTEST THE ADMISSIBILITY THEREOF. 37

IV. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE SECOND, FIFTH AND ELEVENTH CIRCUITS IN REFUSING TO RECOGNIZE THAT IT DOES NOT CONSTITUTE A CRIME FOR A PERSON TO INTERCEPT CALLS OF HIS SPOUSE BY PLACING AN INTERCEPTION DEVICE ON AN EXTENSION LINE IN THE MARITAL HOME WHILE THE PARTIES WERE RESIDING TOGETHER AS HUSBAND AND WIFE. 44

V. THE SIXTH CIRCUIT'S RULING MISINTERPRETED THE PROVISIONS OF 18 U.S.C. §§ 2515, 2518(10)(a) AND 2520(d)(1), TO THE EFFECT THAT AN ATTORNEY WHO PRESENTS UNCONTROVERTED EVIDENCE OF HIS GOOD FAITH IS ENTITLED TO A JUDGMENT OF ACQUITTAL ON CHARGES BROUGHT PURSUANT TO 18 U.S.C. §

2511(1)(D). 46

VI. THE SIXTH CIRCUIT'S INTERPRETATION AND APPLICATION OF 18 U.S.C. § 2511(1)(D) COMPRISED AN UNCONSTITUTIONAL INTRUSION UPON MATTERS CONSTITUTIONALLY RESERVED TO THE STATES AND UPON FUNDAMENTAL RIGHTS WHICH ARE ESSENTIAL TO THE INDEPENDENCE OF THE JUDICIARY AND THE BAR AND THE VIABILITY OF THE ADVERSARY SYSTEM. 52

VII. THE SIXTH CIRCUIT'S RULING, IN RETROACTIVELY APPLYING NOVEL INTERPRETATIONS OF TITLE III, WHICH ARE INCONSISTENT WITH OR CONTRARY TO BOTH STATE AND FEDERAL LAW EXISTING AT THE TIME OF THE OFFENSES CHARGED, CONSTITUTES A DENIAL OF DUE PROCESS OF LAW. 59

CONCLUSION 63

Appendix

Opinion of the United States Court of Appeals For The Sixth Circuit, of December 22, 1992 ..... A-1

Decision of the Sixth Circiut, of August 11, 1993 denying Respondent's Petition For Rehearing A-28

Judgment of the United States District Court For The Northern District of Ohio, Eastern Division, of January 13, 1992 ..... A-30

18 U.S.C. § 2511(1)(d) A-39

18 U.S.C. § 2511(2)(d) A-39

Page

18 U.S.C. § 2515 ..... A-40

18 U.S.C. § 2518(10)(a) A-40

18 U.S.C. § 2520(d)(1) A-41

Wall Street Journal A-42

TABLE OF AUTHORITIES

Cases

Page

Anonymous v. Anonymous, 558 F.2d 677 (2nd Cir., 1977) . 44

Baumrind v. Ewing, 276 S.C. 350, 279 S.E.2d 359 (1981) . . 44

Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E. 2d 910 (C.P. Stark Cty., 1974) 33, 45, 50

Bietz v. Economou, 438 U.S. 478 (1978) 27

California v. Otto, 2 Cal. 4th 1088, 831 P.2d 1178, cert. denied 121 L.Ed. 338 (1992) 36

Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86) 30, 50

DeVargas v. Mason & Hanger - Siles Mason Co., Inc., 844 F.2d 714 (10th Cir., 1988) 29

Dixon v. Georgia Indigent Legal Services, Inc., 388 F. Supp. 1157 (S.D. Ga., 1975) 57

Epps v. St. Mary's Hospital of Athens, Inc., 802 F.2d 412 (11th Cir., 1986) 45

Farroni v. Farroni, 862 F.2d 109 (6th Cir., 1988) 45, 58

FERC v. Mississippi, 456 U.S. 742 (1982) 56

Fluherty v. Fluherty, unreported, C.A. Summit Cty., Case No. 8951 (11/29/78) 61

Fultz v. Gilliam, 942 F.2d 396 (6th Cir., 1991) 45

Page

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 56

Gorin v. United States, 312 U.S. 19 (1941) 46, 47

Heggy v. Heggy, 944 F.2d 1537 (10th Cir., 1991), cert. denied 112 S. Ct. 1514 (1992) 46

In Re Watts, 190 U.S. 1 (1903) 24, 25

Jacks v. Duckworth, 486 F.Supp. 1366 (D. Ind., 1980) 32

Jones v. Preiut & Mandlin, 808 F.2d 1435 (11th Cir., 1987) . 27

Kempf v. Kempf, 868 F.2d 970 (8th Cir., 1989) 45

Liparota v. United States, 471 U.S. 419, (1985) 55

Lizza v. Lizza, 693 F. Supp. 529 (E.D.N.Y., 1986) 44

Maness v. Meyers, 419 U.S. 449 (1975) 24, 25

McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183 (D. Conn., 1984) 40, 41, 51

Mitchell v. Forsyth, 472 U.S. 511 (1985) 28

Moity v. Louisiana State Bar Ass'n, 414 F. Supp. 180 (E.D. La., 1976) 57

Mullaney v. Wilbur, 421 U.S. 684 (1975) 46

National League of Cities v. Usery, 426 U.S. 833 (1976) . . . 56

Newcomb v. Ingle, 944 F.2d 1534 (10th Cir., 1991), cert. denied 112 S.Ct. 903 (1992) 46

Patterson v. New York, 432 U.S. 197 (1977) 46

Page

Perfit v. Perfit, 693 F. Supp. 851 (D. Cal., 1988) 44

Petric v. State, 66 Md. App. 470, 504 A.2d 1168 (1986) ... 47

Philadelphia Resistance v. Mitchell, 58 F.R.D. 139, 147 (E.D. Pa., 1972) 40

Pritchard v. Pritchard, 732 F.2d 372 (4th Cir., 1984) 45

Rice v. Rice, 951 F.2d 942 (8th Cir. 1991) 29

Scheib v. Grant, 814 F. Supp. 736 (N.D. Illinois, 1993) 26, 58

Silverman v. Browning, 414 F. Supp. 80 (D. Conn., 1976) .. 57

Simpson v. Simpson, 490 F.2d 803 (5th Cir., 1974) .. 23, 44, 50

State v. Otto, 226 Cal. App. 3d 163, 27 Cal. Rptr. 596 (1991) 6

Thompson v. Delaney, 970 F.2d 744 (10th Cir., 1992) 54

United States v. Bragan, 499 F.2d 1376 (4th Cir., 1974) 38, 39, 41

United States v. Caron, 474 F.2d 506 (5th Cir., 1973) 32

United States v. Eschavarria-Olarte, 904 F.2d 1391 (9th Cir., 1990) 32

United States v. Johnson, 539 F.2d 181 (D.C. Cir., 1976) ... 42

United States v. Jones, 542 F.2d 661 (6th Cir., 1976) .. 23, 61

United States v. King, 528 F.2d 68 (9th Cir. 1975) 40

Page

United States v. Liddy, 354 F. Supp. 217 (D.D.C.), rev'd, 478 F.2d 586 (1973) 38

United States v. Scavo, 593 F.2d 837 (8th Cir., 1979) 42

United States v. Sisca, 503 F.2d 1337 (2nd Cir., 1974), cert. denied 420 U.S. 1005 42

United States v. Vest, 813 F.2d 477 (1st Cir., 1987) 32

United States v. Winter, 663 F.2d 1120 (1st Cir., 1981) 32

Walder v. United States, 347 U.S. 62 (1954) 33, 36

Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir., 1979) 28

Statutes

18 U.S.C. § 2511 38

18 U.S.C. § 2511(1)(c) 4

18 U.S.C. § 2511(1)(d) 4

18 U.S.C. § 2515 ..... 32, 38, 40, 41, 43, 48, 51, 55

18 U.S.C. § 2518 ..... 32, 41-43, 48, 51, 55

18 U.S.C. § 2520 ..... 40, 50, 51

18 U.S.C. § 2521 ..... 11, 43

Ohio Revised Code, Section 2323.51 53

Page

Miscellaneous

1968 U.S. Code Cong. & Admin. News, at 2184-85 (90th Cong. 2d Sess., 1968) S.Rep. No. 1097 33

Code of Professional Responsibility EC 7-3, 7-4 and 7-5 ... 25

Ohio Code of Professional Responsibility, EC 7-2 53

Ohio Code of Professional Responsibility, EC 7-3 53

Ohio Code of Professional Responsibility, EC 7-4 53

Ohio Code of Professional Responsibility, EC 7-19 53

Ohio Rules of Civil Procedure 26(C) 42

Ohio Rules of Civil Procedure 30(D) 42

Rule 11 of the Federal Rules of Civil Procedure 53

Rule 11 of the Ohio Rules of Civil Procedure 53

Tenth Amendment to the Constitution of the United States .. 55

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of The Supreme Court Of The United States:

Petitioner, William T. Wuliger, respectfully prays that a writ of certiorari issue to review the December 22, 1992 judgment of the United States Court of Appeals for the Sixth Circuit, which judgment became final when said court rejected Respondent's Petition for Rehearing on August 11, 1993.

OPINIONS BELOW

The Decemebr 22, 1992 decision of the United States Court of Appeals for the Sixth Circuit is contained in the Appendix

hereto, beginning at page A1 and is published in 981 F.2d 1497. The Sixth Circuit's August 11, 1993 ruling, which denied Respondent's Petition For Rehearing, is unpublished and is contained herein beginning on page A28. The January 13, 1992 judgment of the United States District Court for the Northern District Court for the Northern District of Ohio, Eastern Division is unpublished and is contained herein beginning on page A30.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed is the Sixth Circuit's decision of December 22, 1992. Respondent's Petition for Rehearing was denied by the Sixth Circuit on August 11, 1993. The case was originally tried in the United States District Court for the Northern District of Ohio, Eastern Division upon an indictment under 18 U.S.C. §§ 2511(1)(c) and 2511(1)(d), and the trial court had jurisdiction under 18 U.S.C. §3231. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

States respectively, or to the people.

United States Code

Contained in the Appendix hereto are the provisions of 18 U.S.C. §§ 2511(1)(d), 2511(2)(d), 2515, 2518(10)(A) and 2520(d)(1).

STATEMENT OF THE CASE AND THE FACTS

This case presents novel and significant issues arising out of this country's first and only criminal prosecution of an attorney solely for using information from a wire interception in the course of judicial proceedings.[1] Attorney William T. Wuliger (hereinafter referred to as "Wuliger") was convicted of three counts of such use, pursuant to 18 U.S.C. § 2511(1)(d), which rendered it illegal to intentionally use "...the contents of any wire...communication, knowing or having reason to know that the information was obtained through the interception of a wire...communication in violation of this chapter."[2] Although the Sixth Circuit ultimately

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[1]See Wall Street Journal article, attached hereto as page A-42.

[2]Wuliger's alleged use of such information consisted of his cross-examination of a litigant and her paramour in four judicial proceedings, consisting of two domestic relations court hearings and two depositions. The indictment set forth four counts alleging

reversed the conviction and remanded the case for a new trial. Petitioner seeks relief herein on the basis that no remand should be necessary because he should have been acquitted of the charged offenses.

The pertinent evidence presented in this case was largely uncontested. For instance, it was uncontroverted that Wuliger's client, David K. Ricupero placed a recording device on an extension line in his own home in order to record the telephone conversations of his wife, Polly Ricupero, while the couple were living together as husband and wife. Tr. 391-417.

It was also uncontroverted that Wuliger did not take part in these interceptions, did not counsel his client to intercept these

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violations of 18 U.S.C. § 2511(1)(c), which prohibits the intentional disclosure of the contents of a wire communication with knowledge or reason to know that the communication was intercepted in violation of the Act. The indictment alleged that the disclosures occurred during four judicial proceedings: a domestic relations hearing on April 10, 1989; two depositions on May 24 and May 26, 1989; and a second domestic relations hearing on July 8, 1989. The indictment also set forth four counts under § 2511(1)(d), alleging the intentional use of the contents of wire communications with knowledge or reason to know that the communications were intercepted in violation of the Act. Each of the above-described judicial proceedings gave rise to one "disclosure" count and one virtually identical "use" count. Insofar as other procedural matters are significant to this appeal, they are discussed below.

conversations and, in fact, had not even met or been retained by Ricupero until well after Ricupero had ceased recording his wife's telephone conversations. Tr. 391, 410, 420, 856.

Wuliger, further admitted that he used information from the wire interception in depositions and court hearings during the divorce proceeding in which he represented David Ricupero. However, Wuliger did not know the circumstances under which the recordings were made, and, pursuant to his ethical duties to his client, was obligated to use the information in representing David Ricupero. Tr. 316, 423, 619, 855-6, 919. In pertinent detail, the facts of the case are as follows.

On March 27, 1989, Polly Ricupero's attorney, Carl Murway (hereinafter "Murway") wrote to David Ricupero, demanding, inter alia, that he produce tape recordings of Mrs. Ricupero's conversations. Tr. 467-8, 542-4; Gov. Ex. 8 & 9[3]. Several days later, Polly Ricupero filed her divorce complaint and immediately obtained an ex parte order removing her husband from the marital home, based on her uncorroborated allegations of

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[3]Murway later formally requested production of tapes, in his request for production of documents. Tr. 742-4.

domestic violence. Tr. 468-9.

On April 4, 1989, David Ricupero had his first contact with Wuliger and retained him to serve as counsel in the divorce case. Tr. 410-11. During that initial conversation, Ricupero represented to Wuliger that he ran a snow-plowing business out of the marital home, that he used an answering machine in connection therewith, and that he had some telephone tape recordings which he thought might be important. Tr. 423-4, 853. Ricupero further indicated that some of the recordings were of his own calls and some of his wife's, but that all recordings had been made with his wife's knowledge.[4] Tr. 423, 853. Wuliger assumed that such recordings were from that telephone answering machine.[5] Tr. 316, 855-6. At

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[4]Despite testifying under a grant of immunity, Ricupero consistently confirmed at Wuliger's trial that he had indeed represented to Wuliger that these recordings were consensually acquired. Tr. 423.

[5]Although the prosecutor was permitted to argue that there is no such thing as an answering machine that records outgoing as well as incoming calls (Tr. 1133) it is a matter of common knowledge that there are indeed such devices (e.g., State v. Otto, 226 Cal. App. 3d 163, 27 Cal. Rptr. 596 (1991), in which the reviewing court held that nonconsensually acquired interspousal recordings from a voice-activated tape recorder were admissible) and the only testimony on this question at trial was that such technology is on the market. Tr. 1002.

Wuliger's direction, his law clerk, Doug Leak (hereinafter "Leak") had Ricupero bring the tapes into the office, where they were transcribed by Wuliger's secretary Laura Davis. Tr. 853. Thereafter, Leak reviewed these transcripts and prepared written summaries thereof. Tr. 858. The reason for the summaries was so that Wuliger could save himself time, and his client money, by not having to listen to the tapes or read the complete transcript himself. Tr. 859. Thus, Wuliger never sat down and listened to the tapes nor did he read the transcripts in full. Id.

Prior to the quickly approaching April 10th hearing[6] (on the issue of whether Ricupero would continue to be barred from the marital home), Wuliger sought unsuccessfully to convince Murway of the wisdom of getting Ricupero back into the marital home and settling this case without creating the significant expenses of contested litigation.[7] Tr. 852.

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[6]Two counts of the indictment dealt with events during the hearing of April 10, 1989. However, since Wuliger was acquitted on both of these counts, no extended discussion thereof will be contained herein.

[7]Wuliger pursued the possibility of settlement throughout these proceedings, contacting Murway on April 11, May 9-10, June 6, June 13 and throughout 1989. Tr. 577-9.

In her divorce complaint, her answer to David Ricupero's counterclaim for divorce and her testimony at the hearing of April 10 and her subsequent deposition, Polly Ricupero consistently sought to portray herself as a dutiful, loving and long-suffering wife who was driven from this marriage by a violent and abusive husband. See generally, Gov. Ex. 1. However, by the time of Polly Ricupero's continued deposition of May 24, 1989, Wuliger had reviewed Leak's summaries and was aware of contradictory information. The summaries suggested that, if David Ricupero had been guilty of marital fault in the past, he had reformed prior to the commencement of the divorce action; according to Polly Ricupero's phone conversations, she was well aware that her husband had ceased drinking and smoking and had become or was attempting to become the "perfect" husband and father. Tr. 860. The tapes also indicated that the source of Polly Ricupero's dissatisfaction with the marriage was not any wrongdoing on his part, but merely that his reformation did not coincide with the lifestyle to which she had grown accustomed, one centered around the bar scene, drug use, infidelity and "partying." Tr. 156-8, 412-13. Alas, David had become a homebody; his efforts to support his family and care for

his children had rendered him, in Polly Ricupero's estimation, boring. Tr. 193.

As to the issue of domestic violence which led to David Ricupero's ouster from the marital home -- and to Polly Ricupero decidedly gaining the upper hand in the divorce proceedings -- Leak's summaries reflected conversations in which Polly Ricupero had earlier discussed how easy it would be to fabricate such charges. Tr. 966-8.

Leak's summaries also revealed that Polly Ricupero had been secreting marital funds in anticipation of a divorce since at least December of 1988 -- a fact which would be significant to the issues of temporary alimony, alimony and property division. Tr. 574-5. The following exchange occurred at Polly Ricupero's May 24th deposition:

> Q: Do you have any idea why you would make a statement to someone that you were trying to hide money prior to Christmas from your husband? Do you have any idea why you would make such a statement? Would that be another example of your humor?
> A: No, probably it would be another example of how I knew I was being taped at my house after someone told me there probably was a listening devise (sic) installed in my house. So there were times I was saying just about anything I wanted to say, just for David's purposes of him coming home

and listening to them.. Tr. 633, Gov. Ex. 2, pp. 237-8 (Emphasis added).

Earlier in the deposition, Murway objected in carefully limited language to inquiry based on these recordings, stating that Mrs. Ricupero had "...no idea when these tapes were made...[and that she] was apparently unaware at the time this particular recording was made that she was being recorded." Gov. Ex. 2, p. 198 (emphasis added). Murway also agreed, in the presence of his client, that tape-related inquiry could proceed on the condition that any tapes so used would be produced in discovery and with the understanding that the divorce court would ultimately rule on contested issues of discoverability and admissibility. Tr. 622-4; Gov. Ex. 2, pp. 178-82. At Wuliger's trial, Murway acknowledged that this was a binding agreement. Tr. 622-7.

Two days later, on May 26, 1989, Wuliger conducted the deposition of John Wilhelm and explored the issue of whether Polly Ricupero was aware that her phone calls were being recorded. Wuliger also inquired regarding the conversation about hiding money, which Mrs. Ricupero had previously indicated was "another example" of her knowledge that she was being recorded. Tr. 633; Gov. Ex. 3, p. 62-3. Wuliger also questioned Wilhelm as to any

discussions he had with Mrs. Ricupero regarding her knowledge or belief that David Ricupero had tapped her phone. Tr. 900-01; Gov. Ex. 3, p. 69. The trial court refused to allow Wuliger to explain why he engaged in this line of inquiry. Tr. 901.

At David Ricupero's deposition on June 16, 1989, Wuliger attempted to resolve the ongoing discovery and admissibility issues by offering to turn the tapes over to Murway, upon his agreement that the contents would not be revealed to Mrs. Ricupero until her deposition could be completed. Murway rejected that offer. Tr. 636-7, 903-7. Wuliger then offered to provide the tapes to the divorce court for an in camera inspection and admissibility ruling, but Murway rejected that offer as well. Id.

During the course of the Ricupero divorce litigation, Murway never sought court intervention, via either federal injunctive relief under § 2521 or in the divorce court through a motion to suppress or for a protective order. Tr. 591, 613-14. His only action involved his June 30, 1989 motion to disqualify Wuliger, to which he attached his own affidavit and that of Polly Ricupero. Tr. 613-14; Gov. Ex. 14. The focus of these affidavits was that the tapes allegedly contained confidential communications

between Murway and his client, although no evidence of that allegation was ever presented in the divorce litigation or in the case at bar.[8] Mrs. Ricupero's affidavit indicated that she had discovered evidence of a wiretap, an empty recording-device box from Radio Shack. Gov. Ex. 14. Significantly, neither of the affidavits alleged the date on which Mrs. Ricupero found this empty box and whether this discovery was before or after the recordings had been made; nor did either affidavit allege the recordings were made without Mrs. Ricupero's knowledge. Id.

After that allegation, Wuliger's only use of tape-related evidence occurred at the temporary alimony hearing of July 8, 1989, at which time Wuliger's use was an inquiry solely limited to asking Mrs. Ricupero if she recalled her May 24th deposition testimony where she admitted she knew she was being recorded. Tr. 912-13; Gov. Ex. 4, pp. 59-62. Murway's general objection to this question was overruled by the hearing referee. Gov. Ex. 4, p.

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[8]Doug Leak testified in general terms that he recalled a portion of the transcript where Polly Ricupero placed a phone call and a voice responded "Kelley, McCann & Livingstone", which was Murway's law firm. Tr. 737. However, absolutely no evidence was presented that Mrs. Ricupero's call was then connected with Murway or that any confidential or privileged information was revealed.

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On October 5, 1989, the Ricupero divorce court held a hearing on the motion to disqualify and, for the first time, Murway cited the Act and unequivocally alleged that all of the recordings were non-consensual. Tr. 643, 649, 917. Despite the earlier waiver of Mrs. Ricupero's attorney-client privilege[9], much of Murway's argument at this hearing was that Wuliger should be disqualified because the tapes purportedly contained privileged information. Id. Because Murway was intentionally concealing the existence of the ongoing criminal investigation, the fraudulent nature of Murway's privilege argument was not revealed to Wuliger or the divorce court. Tr. 557-63.

On the same date, Wuliger explained to his partner, William Beyer, the allegations of illegality which had been raised at the hearing; Beyer then advised Wuliger that if the tapes were indeed illegally obtained, the divorce court would not allow them

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[9]Unbeknownst to Wuliger, Mrs. Ricupero had waived her attorney-client privilege in early September, 1989, at which time she and Murway began supplying information to the Government, relative to its secret investigation of Wuliger. Tr. 557-63. This investigation was deliberately concealed from Wuliger until April of 1990. Tr. 322, 925, 935.

to be used as evidence.[10] Tr. 919-20. At approximately the same time, Wuliger told David Ricupero that he could pick up the tapes because Wuliger was leaning toward not using them. Tr. 923-4. Ricupero subsequently picked up the tapes. Thereafter, on October 25, Wuliger wrote to Ricupero explaining that he would not use the tapes in any manner, regardless of Ricupero's assurances that they were legally obtained. Tr. 925-7; Gov. Ex. 15. The letter further explained that Ricupero could obtain substituted counsel if he disagreed. Id. Following receipt of that letter, Ricupero phoned Wuliger, indicating that he understood that Wuliger would not use the tapes and authorizing Wuliger to proceed on that understanding. Tr. 927. With the disqualification motion still pending, Wuliger wanted to be in a position to represent to the divorce court that there would be no future use of the tapes and that, in fact, he no longer had either the tapes or the transcripts thereof; accordingly, Wuliger threw out the transcripts and the summaries. Tr. 928.

In late October and November of 1989, Wuliger and

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[10]Beyer testified at trial that he believed that this conversation occurred shortly after Mrs. Ricupero's deposition, but that, despite reviewing his calendar he was unable to specifically recall the time-frame of that conversation. Tr. 294, 312-20.

Murway engaged in ongoing settlement discussions, which culminated in an agreement resolving all issues before the divorce court and containing a provision in which Mrs. Ricupero released Wuliger and her husband from all potential civil liability from any source. Tr. 563, 666-7, 929-30.

Nevertheless, after signing the release, Mrs. Ricupero surreptitiously recorded her conversations with David Ricupero, in an effort to obtain admissions from him as to his or Wuliger's wrongdoing. Tr. 246, 249-52, 335-45, 349-50. The purpose of these recordings, according to the prosecutor, was so that Polly Ricupero could convince a local attorney, Gerald Gold, to represent her on a contingent fee basis in a civil suit against Wuliger and David Ricupero. Tr. 250-52.[11]

It now appears that David Ricupero intercepted Polly Ricupero's wire communications, during a one-week period in mid-

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[11]18 U.S.C. § 2511(2)(d) declares unlawful any surreptitious recording done for a tortious purpose. Mrs. Ricupero's purpose in recording David Ricupero was for the purpose of enabling her to commit a tort (malicious prosecution) by commencing a civil action against Wuliger and Mr. Ricupero after she had formally released both of them from any such civil liability. Despite the fact that this recording was done for tortious purposes -- in violation of the Act -- the Government utilized them in its case-in-chief in an effort to impeach David Ricupero. Tr. 439-44.

March of 1989, by placing a device on an extension line in his own home, without his wife's prior knowledge or consent. Tr. 417-18. According to Mrs. Ricupero's trial testimony, she did not discover evidence of the tap until June of 1989. Tr. 71. It is equally clear however, that neither of these facts were known by Wuliger until well after the last event charged in the indictment. Tr. 619, 919; Gov. Ex. 14.

Defense counsel presented this case to the trial court on two theories: That a conviction under § 2511(1)(d) requires proof that the defendant intentionally used information which he knew or had reason to know was derived from an unlawful wiretap and that, therefore, the issue of Wuliger's good faith was crucial; and that attorneys and others in court proceedings may make limited use of even allegedly tainted evidence, providing that such use is done in good faith. However, in the Government's argument and in the trial court's instructions, this case was presented to the jury upon the erroneous theory that the Government had absolutely no burden of proving Wuliger's knowledge of the illegal source of the recordings and that all considerations relating to good faith were totally irrelevant. Under the trial court's instructions, the jury was

only permitted to consider the issues which were uncontested at trial, i.e., that he used information which had, in fact, resulted from a wiretap. The court's erroneous instructions amounted to a directed verdict of guilty. No instruction whatsoever was given on good faith.

At the conclusion of this trial, the jury returned a verdict of guilty as to Counts 4, 6 and 8 of the indictment (relating to the divorce court proceedings of May 24, May 26 and July 8, 1989), and not guilty as to the remaining "use" count and all four of the "disclosure" counts. Wuliger was sentenced to a thirty-day term of house arrest, a $5,000.00 fine, a statutory assessment of $125.00, and a two-year probationary term, conditioned upon the immediate surrender of Wuliger's license to the practice law. Execution of the sentence was stayed pending appeal, with the exception of the provision for the fine, which has since been satisfied by Wuliger.

On appeal to the United States Court of Appeals for the Sixth Circuit, the reviewing court reversed Wuliger's conviction and remanded the case for a new trial on the grounds that the trial court committed reversible error in its definition and application of "reason to know" and in failing to instruct the jury on all essential

elements of the charged offenses. The Sixth Circuit further noted that the trial court's instructions erroneously deprived Wuliger of his only defense and were tantamount to a directed verdict of guilty. Although the Sixth Circuit acknowledged that other insturctions were prosecutorially skewed, the remainder of Wuliger's assignments of error were overruled.

The Government's subsequent petition for a rehearing was overruled by the appellate court on August 11, 1993. The Government then moved for an extension of time to file a suggestion for rehearing en banc, which motion was overruled on September 30, 1993.

REASONS FOR GRANTING THIS WRIT

I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER, IN ORDER TO AVOID AN INEVITABLE CHILLING EFFECT ON THE BAR, THE JUDICIARY AND CLIENTS' RIGHTS TO ZEALOUS ADVOCACY, TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (18 U.S.C. §§ 2510, ET SEQ.) MUST BE CONSTRUED AS PROVIDING A NARROWLY DEFINED CRIMINAL IMMUNITY FOR THOSE INDIVIDUALS WITHIN THE ADVERSARY SYSTEM WHO UTILIZE THE CONTENTS OF WIRE INTERCEPTS BASED UPON THE REASONABLE, GOOD FAITH POSITION THAT SUCH INFORMATION HAS BEEN LAWFULLY OBTAINED OR IS LAWFULLY ADMISSIBLE.

Society demands much of those who serve it as its legal

advisors and advocates. It requires that an attorney zealously champion his client's cause, unencumbered by -- and often contrary to -- the attorney's personal opinions, desires or fears. These requirements are so fraught with complexities and uncertainties that virtually every state has adopted detailed compilations of principles governing the practice of law. Attorneys such as Wuliger, who practice in Ohio's state court system, are governed by the Code of Professional Responsibility, which in 1989 provided, in pertinent part, as follows:

> EC 7-2
> The bounds of the law in any given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.
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> EC 7-3
> Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different....While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law....

EC 7-4

The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law....

* * *

EC 7-6

Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist the client in the development and preservation of evidence of existing motive, intent, or desire; obviously he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in this situation he should resolve reasonable doubts in favor of his client....

* * *

EC 7-19

Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate by his zealous

> preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open mind and to render impartial judgments....
> (Emphasis added).

In the case at bar, Wuliger's first contact with Mr. Ricupero and the recordings of Mrs. Ricupero's conversations occurred after Mr. Ricupero had ceased all intercept activities. Polly Ricupero had already commenced her divorce action and managed to have her husband judicially removed from the marital home on the basis of her ex parte allegations of domestic violence. By the time of her May 24th deposition, she had also filed a motion for temporary alimony and a response to David Ricupero's counterclaim for divorce, denying that she had been guilty of any marital fault. In her pleadings and testimony, she attempted to portray herself as a loving and dutiful wife and mother who lived in constant fear of an abusive, violent husband. Gov. Ex. 1.

The recordings of her telephone conversations, however, suggested that this portrayal constituted a virtual fraud upon the court. The truth was that she was well aware that David Ricupero was not the monster that she was claiming. Indeed, he was doing everything he could to please her and to become the perfect husband and father. The tapes also reflected that Mrs. Ricupero

was anything but a demure and dutiful housewife and mother. Rather, she was more interested in the bar scene than her home life and more interested in satisfying her own promiscuous predilections than in the needs of her own husband and children. Indeed, while she was engaged in trysts and adventures away from home, David Ricupero was baby-sitting the couple's four children. Moreover, the tapes strongly suggested that the domestic violence charges may have been fabricated and that she had strategically distanced herself from the marriage some months earlier, as reflected by her surreptitious sequestering of marital assets in December of 1988, in anticipation of the divorce suit. Thus, the veracity of Mrs. Ricupero's past representations was doubtful. Her strategy for the future was relatively clear: In an attempt to gain an unfair advantage in the divorce case, in terms of child custody, alimony and property division, she would continue to attempt to perpetrate a fraud upon the court.

When David Ricupero submitted the tapes to Wuliger, he represented that the tapes had been made while the couple was still residing together as husband and wife and that the recordings were made with his wife's knowledge. Moreover, Wuliger was aware of

at least one federal court decision which held that the Act does not proscribe an interception by one spouse of the other in the marital home while the couple resides together.[12] Wuliger was also aware that Ohio courts were admitting such taped evidence in divorce trials, whether or not the recordings were made with the consent of the parties.

Under such circumstances, Wuliger was obligated as an advocate to pursue these matters in discovery in order to create a record upon which the divorce court could determine the admissibility of the tape recordings.[13] The question presented here is whether such a limited use by an attorney in formal judicial proceedings can constitute a crime.

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[12]E.g., Simpson v. Simpson, 490 F.2d 803 (5th Cir., 1974), cert. denied 419 U.S. 897. Wuliger was not aware at that time of the Sixth Circuit's decision in United States v. Jones, 542 F.2d 661 (6th Cir., 1976). However, because the parties in Jones were no longer residing together at the time of the interceptions, Jones is distinguishable from the facts of the Ricupero divorce case and was, therefore, not dispositive of this issue. Accordingly, even if Wuliger had been familiar with the Jones decision, he would still have been ethically obliged, as an advocate, to proceed as he did.

[13]The wiretap act itself presupposes such a limited use in judicial proceedings, in that 18 U.S.C. §§ 2515 and 2518 provide a mechanism for a court ruling on the admissibility or suppression of wiretap information prior to trial.

Under analogous circumstances, this Court has held that an attorney's conduct in the course of judicial proceedings is to be evaluated in the context of his essential role within the adversary system and the importance of that system to the entire process of administering justice. In reversing an attorney's contempt conviction, which arose from his erroneous advice to a client, this Court held as follows:

> In the ordinary case of advice to clients, if an attorney acts in good faith and the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administrative of justice to allow the application of any other rule. In Re Watts, 190 U.S. 1, at 29 (1903).

Similarly, in Maness v. Meyers, 419 U.S. 449 (1975), this Court reversed a contempt conviction against another attorney, who had advised his client to disobey a court order. The majority opinion expressed a concern that an ever-present risk of contempt sanctions, resulting from an attorney's honest, though erroneous, advice to a client, would cause some advocates to "...lose their zeal for forthrightness and independence...." which would contravene their duties as advocates. Id. at 466. The Court further noted that,

if a lawyer may be punished for rendering advice in good faith, there would be a genuine risk that clients would not receive essential advice as to their legal rights. Id., at 467. In a separate concurring opinion, Justices Stewart and Blackmun noted as follows:

> The Court's opinion and Mr. Justice White's concurring opinion fully explain the circumstances that in this case justified Maness' advice to his client to refuse to comply with the trial judge's order to produce the subpoenaed material. Under these circumstances, Maness did no more than properly perform the conventional service of a lawyer. To punish him for performing his professional duty in good faith would be an arbitrary interference with his client's right to the presence and advice of retained counsel -- and thus a denial of due process of law. Id., at 472.

In the case at bar, the conduct which gave rise to the charges against Wuliger was not advice, but actions taken by him as an advocate. Pursuant to the Code of Professional Responsibility, the role of an attorney as an adviser demands greater circumspection than his role as advocate.[14] Thus, the rationale of the opinions in In Re Watts, supra and Maness v. Meyers, supra -- which recognized the dangers resulting from an

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[14]See EC 7-3, 7-4 and 7-5 of the Code of Professional Responsibility.

attorney's excess of caution in rendering legal advice -- applies with even greater force to the potential chilling effect on advocacy.

Under circumstances substantially similar to those of the case at bar, one court has recently echoed these concerns in recognizing civil immunity for attorneys. Scheib v. Grant, 814 F. Supp. 736 (N.D. Illinois, 1993). In that case, the court noted that the unique roles of attorneys in judicial proceedings mandates that they be able to participate zealously without fear of intimidation or harassment. The Court went on to note that there are sufficient safeguards within the judicial system -- e.g., suppression of evidence and disciplinary sanctions -- to protect litigants from improper uses of evidence in court proceedings.

In the case sub judice, any attorney who represented David Ricupero in 1989 would have been confronted with the same circumstances which confronted Wuliger, to wit: (1) A client who represented that the tapes were consensual in nature; (2) An opposing party whose recorded conversations were inconsistent with her representations during the divorce proceedings; and (3) Knowledge of precedent holding that the Act did not proscribe spousal interceptions from an extension line within the marital

residence during the marriage and cohabitation of spouses; (4) An opposing party, who, through her attorney, agreed to allow Wuliger to use the tapes for purposes of discovery and an ultimate ruling by the trial court as to the admissibility thereof; (5) An opposing party whose sworn deposition testimony was that she knew she was being recorded and that she had, in fact, fictionalized the contents of her telephone conversations in an apparent effort to irritate her husband; and (6) The obligation to explore tape-related issues to prepare a defense for his client regarding the taping.[15]

Courts have recognized such factors in extending good faith immunity for private individuals, at least in a civil context. E.g., Bietz v. Economou, 438 U.S. 478 (1978); Jones v. Preiut &

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[15] At the May 24 deposition, Mrs. Ricupero's attorney indicated that she was "apparently" unaware that one "particular" conversation had been recorded. Thus, under the doctrine set forth in McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183, at 1190-91 (D. Conn., 1984), Wuliger could lawfully explore the extent of her consent or knowledge as it related to David Ricupero's potential civil or criminal liability under the Act, particularly because Mrs. Ricupero had already exhibited both propensity to lie and a hostility toward her husband which might lead her to pursue even groundless actions against Wuliger's client.

Under those circumstances, Wuliger was duty-bound to explore in discovery all issues relating to or arising from the tapes. More importantly, Wuliger's client was entitled to the zealous representation of counsel which is essential to the adversary system.

Mandlin, 808 F.2d 1435 (11th Cir., 1987), rehearing en banc 951 F.2d 1321 (1988), vacated on other grounds and remanded per 109 S. Ct. 573 (1989). The threshold question in determining the issue of immunity is whether, at the time of the actor's conduct, his actions violated clearly established law. Mitchell v. Forsyth, 472 U.S. 511 (1985).

> ...Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes. Zweibon v. Mitchell, 606 F.2d 1172, at 1181, footnote 49 (D.C. Cir., 1979), cert. denied 453 U.S. 912. (Emphasis added).

In the instant case, such a conflict of decisions existed as to the criminality of interspousal and extension line wiretaps. Under similar but not identical circumstances, the Eighth Circuit Court of Appeals refused to hold a lawyer civilly liable under the Act, stating as follows:

> As recognized by the district court in Kratz v. Kratz, 477 F.Supp. at 483,
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> > Lawyers are not soothsayers, and possess no crystal balls in which to foresee changes in judicial interpretations of the law.
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> > * * * * * *
> >
> > We cannot, as a matter of fundamental

> justice say that individuals act at their peril when they reasonably rely upon judicial interpretations. If the law required otherwise, we would do better to replace our courts with casinos and dispense judgments by a spin of the roulette wheel.

Rice v. Rice, 951 F.2d 942, at 945-6 (8th Cir. 1991).[16]

On any of the above-stated bases, Wuliger was constrained, by Ohio's formally adopted rules regulating the conduct of attorneys, to utilize these tape recordings. The significance of such a countervailing, governmentally imposed regulation was recognized by the court in DeVargas v. Mason & Hanger - Siles Mason Co., Inc., 844 F.2d 714, at 721-2 (10th Cir., 1988), cert. denied 111 S. Ct. 799 (1991) which stated as follows:

> The type of case before us presents the strongest arguments for extending qualified immunity to private party defendants. First, the governmental authority involved requires private defendants to act as they do. Indeed, were they to act otherwise they would be liable for breach of contract to the governmental body with whom they contracted. Not to allow immunity here places defendants between Scylla and Charybdis -- potentially liable

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[16]Unlike Wuliger, the attorney-defendant in Rice had advised his client to obtain evidence by intercepting the telephone calls of the client's husband. At the time of such advice, federal district courts located in the attorney's State recognized a spousal exception to the Act. That position was later overruled by the Circuit Court.

> either to plaintiffs for obeying the contract, or to governmental bodies for breaching it.

If an attorney may be held criminally liable for using taped information under such circumstances, he would most certainly be trapped between the Scylla of violating his professional duties to his client and the Charybdis of risking criminal prosecution if his client's conduct in recording such conversations is later determined to have been unlawful.[17] If an attorney may be criminally prosecuted under these circumstances, then judges, jurors and court reporters might also be at risk for their use of information from a wire intercept which is later determined to be unlawful. Even reviewing courts, such as the Cuyahoga County Court of Appeals in Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86), would be at risk. In Cooper, the trial judge allowed the litigant-wife's attorney to cross-examine the husband in detail on the basis of the contents of his wire communications, but excluded the transcripts themselves. In

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[17]In Newcomb v. Ingle, 944 F. 2d 1534 (10th Cir., 1991), the court implicitly recognized the interplay between an attorney's duties and the need for recognizing a limited immunity relative to the federal wiretap act, holding that a prosecutor has "absolute immunity for her actions taken prior to deciding not to prosecute, such as reviewing and evaluating the tapes." Id., at 536.

considering whether the trial court erred, the court of appeals compared the contents of the transcripts with the testimony of the husband and concluded that any error was harmless. Thus, rather than determining whether the tapes resulted from an illegal wiretap, the court of appeals instead used the tainted evidence to decide a collateral issue.[18] Unless there exists an immunity based on the good faith use of such materials in judicial proceedings, it is clear that, not only the wife's attorney, but both the trial judge and reviewing court in the Cooper case could have been risking criminal prosecution.

Accordingly, appellant respectfully submits that it is vital that this Court review this case to determine whether the Act must be construed as providing a narrowly defined criminal immunity for those individuals within the adversary system who utilize the contents of wire intercepts based upon the reasonable, good faith position that such information is both lawfully obtained and lawfully admissible.

II. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE FIRST, FIFTH, SEVENTH AND

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[18]The trial court in Cooper was the very same domestic relations court in which the Ricupero divorce was pending.

NINTH CIRCUITS IN REFUSING TO RECOGNIZE THAT IT IS LAWFUL TO USE THE CONTENTS OF EVEN AN UNLAWFUL WIRE INTERCEPTION FOR PURPOSES OF IMPEACHING AN OPPOSING PARTY DURING THE COURSE OF FORMAL LEGAL PROCEEDINGS.

The Act provides a mechanism through which the fruits of a wire intercept may be suppressed or excluded in judicial proceedings. §§ 2515 and 2518. However, the existence of this mechanism does not necessarily preclude the use of the contents of even an unlawful tap in all judicial proceedings. Courts in at least five federal circuits have recognized that the fruits of even an illegal wiretap may lawfully be used for impeachment purposes. United States v. Eschavarria-Olarte, 904 F.2d 1391 (9th Cir., 1990); United States v. Vest, 813 F.2d 477 (1st Cir., 1987); United States v. Winter, 663 F.2d 1120 (1st Cir., 1981), cert. denied 460 U.S. 1011; United States v. Caron, 474 F.2d 506 (5th Cir., 1973); Jacks v. Duckworth, 486 F.Supp. 1366 (D. Ind., 1980), aff'd 651 F.2d 480 (7th Cir., 1981).[19]

The court in United States v. Vest, supra, at 484, buttressed its conclusion as to the existence of this impeachment

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[19]Indeed, as discussed above, the prosecutor in the case at bar used apparently unlawful recordings during the course of this trial in an attempt to impeach David Ricupero.

exception to the exclusionary statute by noting the legislative history of the Act,[20] in which Congress specifically referenced Walder v. United States, 347 U.S. 62 (1954) -- the case which first established the impeachment exception in another context.

In the case at bar, by the time of Polly Ricupero's deposition, she had already misrepresented herself and her case to the trial court in a number of significant respects, not the least of which related to allegations of marital fault and domestic violence. Under these circumstances, Wuliger's impeachment use of the recordings was both appropriate and lawful.

Under very similar circumstances, an Ohio domestic relations court ruled that such recordings would be admissible to impeach the plaintiff-wife, who had lied and been evasive as to the extent and nature of her extramarital affair and who also had apparently fabricated or attempted to fabricate grounds for her divorce action. Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E. 2d 910 at 96-7 (C.P. Stark Cty., 1974). The Court further stated as follows:

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[20]See S. Rep. No. 1097, at 96, reprinted in 1968 U.S. Code Cong. & Admin. News, at 2184-85 (90th Cong. 2d Sess., 1968).

> This Court is convinced that any other finding relative to the admission of these tapes would be a denial of justice to the defendant in this cause.... When one of the parties violates the marriage contract, within the confines of the home and is sufficiently secretive so as to avoid public knowledge, the other party is placed in an indefensible position. To deny the admission of these tapes would be to deny the defendant the only material, creditable evidence that he was able to obtain.
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> Therefore, this Court is satisfied that the tapes were properly admitted so as to impeach the testimony of the plaintiff, and further, that neither the statutes, the Ohio Constitution, the federal Constitution as it relates to the right of privacy, or the Omnibus Crime Control Act prevent the admission of said tapes. Id., at 103-04.

In the case at bar, Polly Ricupero went to great lengths to fraudulently gain the upper hand in the divorce proceedings by misrepresenting herself. Certainly, none of the cases cited in this section contemplated that the provisions of the Act could both shield a party from the dangers of perpetrating a fraud upon the court and, at the same time, be used as a sword to deter opposing counsel's attempt to air the truth. In the case sub judice, the Sixth Circuit noted that the other jurisdictions which have considered this issue have thus far only recognized an impeachment exception for prosecutors in federal criminal cases. While refusing to reach the

issue of whether prosecutors are entitled to the protection of an impeachment exception, the Sixth Circuit refused to apply such exception in this case, where the underlying use was by a private attorney in a civil action. The court's rationale was that the truth-finding goal is more important in criminal than in civil cases and that the impeachment use of intercepted information in civil discovery proceedings would not be amenable to immediate judicial oversight. However, the Sixth Circuit's suggestion that private attorneys may be held criminally liable for the same acts which a prosecutor may engage in with impunity creates an unconstitutional distinction between classes of lawyers based solely upon who their clients happen to be.

Such an interpretation effectively exempts federal prosecutors from criminal prosecution while simultaneously granting to the Justice Department the ultimate control over the private bar, by usurping the traditional authority of State supreme courts to regulate the conduct of attorneys who practice in each State's court system.

Moreover, the purpose of the impeachment exception, as developed through Fourth Amendment cases, is not to guarantee

that the trial court will discover the truth. If truth-finding were the paramount concern, there would be no exclusionary rule to begin with. The purpose of the impeachment exception is, rather, to protect the integrity of the truth-finding function of the court, i.e., to prevent people from perpetrating a fraud upon the court by perjuring themselves while using the exclusionary rule to shield themselves from the disclosure of their deceit. E.g., Walder v. United States, 347 U.S. 62 (1954). Petitioner submits that this purpose is equally and identically important regardless of whether a criminal or a civil case is involved and regardless of whether the impeaching attorney is the agent of the government or a private individual.

Recently, this Court declined jurisdiction of an appeal from the decision in California v. Otto, 2 Cal. 4th 1088, 831 P.2d 1178, cert. denied 121 L.Ed. 338 (1992), a murder case in which the prosecutors had used the contents of an interspousal interception in obtaining a conviction, following an unsuccessful motion to suppress. The State supreme court ruled that the evidence should have been suppressed based on its rejection of a statutory exemption for interspousal taps. However, the court, in dicta,

strongly indicated that, had the defendant testified at trial, an impeachment use of the tape recording would have been appropriate. It seems equally clear that, had the defendant sued her murdered husband's insurer for life insurance proceeds and testified during those civil proceedings, defense counsel would have been equally justified in using the tapes for impeachment purposes, just as Wuliger did herein.

Thus, Petitioner respectfully submits that the confusion and division among the Circuits on this issue warrants this Court's review of this important question.

III. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE SECOND, FOURTH, EIGHTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS IN REFUSING TO RECOGNIZE THAT IT IS NOT UNLAWFUL FOR AN ATTORNEY TO USE THE CONTENTS OF EVEN AN UNLAWFUL WIRE INTERCEPTION DURING LEGAL PROCEEDINGS AFTER THE VICTIM OF THE INTERCEPTION HAS EXPRESSLY CONSENTED TO SUCH USE AND/OR HAS UNCONTROVERTEDLY WAIVED HER RIGHT TO CONTEST THE ADMISSIBILITY THEREOF.

Early in the May 24, 1989 deposition of Polly Ricupero, it was agreed between counsel, in Mrs. Ricupero's presence, that the subject tapes could be used during discovery, but that the trial judge would ultimately have to decide the contested discovery and admissibility issues. Gov. Ex. 2, pp. 178-82. At trial, Murway

acknowledged that this was a binding agreement which was reached in the presence of his client and further acknowledged that, upon subsequent use of the tapes by Wuliger, he (Murway) even admonished Mrs. Ricupero to answer Wuliger's questions. Tr. 624-29.

It is beyond peradventure that no crime is committed by a person who intercepts telephonic communications with the consent of one of the parties. Similarly, no crime is committed by one who uses or discloses information from an illegal intercept where one of the parties thereto consents to such use or disclosure. As held by one reviewing court:

> Because [the defendant's] victims consented to the introduction of their wiretapped conversation, the exclusionary rule of 18 U.S.C. § 2515 did not render inadmissible the wiretaps [the defendant] made in violation of 18 U.S.C. § 2511. It is the victims' consent that distinguishes this case from the ruling of the court of appeals reversing **United States v. Liddy**, 354 F. Supp. 217 (D.D.C.), rev'd, 155 U.S. App. D.C. 382, 478 F.2d 586 (1973). **United States v. Bragan**, 499 F.2d 1376, 1380 (4th Cir., 1974)(footnote reference omitted).

Section 2515 mandates the exclusion of the contents of a wire intercept in any judicial proceeding "...if the disclosure of that information would be in violation of [§§ 2510, et seq.]." Thus, the

admissibility ruling in United States v. Bragan, id., can only mean that no violation of the § 2511(1)(d) occurs when an attorney uses the contents of a wiretap with the consent of one of the parties to the taped conversation.[21]

Similarly, a defendant and his attorney may lawfully use

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[21]In the case sub judice, the Sixth Circuit rejected appellant's argument that a victim's consent to the use of his unlawfully intercepted conversations vitiates the criminality of the subsequent use thereof. The reviewing court believed that the Bragan holding was based on the victim's consent to the interception itself and not on their consent to the use of information from the interception. Appellant respectfully submits that the Sixth Circuit's reading of Bragan was erroneous. Bragan was charged with wiretapping and possession of wiretap devices. He was convicted of those offenses, and the reviewing court affirmed those convictions. Clearly, if the victims of Bragan's wiretapping activities had consented to the interceptions, the appellate court could not have affirmed his conviction for wiretapping, since it is not a crime to intercept a wire communication where a party has consented to the interception. Appellant submits that, although inartfully drafted, the Bragan opinion was referencing two sets of recordings. As indicated at 499 F.2d 1380, the government's proof consisted in part of Bragan's taped wire conversations with his accomplices and, therefore, those tapes were admissible because the accomplices had consented to the interceptions themselves. However, in the last full paragraph of the opinion, the court also indicated that Bragan's victims consented to the introduction into evidence of their intercepted conversations. The court also noted that Bragan was not a party to those conversations with his accomplices. Thus, the accomplice recordings were admissible because the accomplices consented to the interceptions. The victims' recordings, on the other hand were admissible solely because the victims consented to their use at trial. In order to warrant a wiretapping conviction and an affirmance thereof, that is the only possible reading of Bragan.

the contents of an allegedly unlawful wiretap for purposes of preparing a defense to potential criminal or civil liability under the Act. United States v. King, 528 F.2d 68 (9th Cir. 1975); Philadelphia Resistance v. Mitchell, 58 F.R.D. 139 (E.D. Pa., 1972). As recognized by the court in McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183, at 1190-91 (D. Conn., 1984):

> To deny defendant's counsel any possibility of investigating or rebutting allegations on which plaintiffs' claim for punitive damages is based, or of discussing the contents of the tapes with their clients in the course of preparing a defense of this lawsuit, would be to convert the allegations of the complaint into a judgment. Any such construction of the statute would be absurd on its face and would be so incompatible with basic notions of fairness in adversary proceedings that it might well raise questions regarding the statute's constitutionality
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> * * *
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> Section 2515 was no more designed to keep defendants in lawsuits brought under § 2520 from defending the alleged violations of § 2511 than it was to keep the Government from prosecuting violators under § 2511. (Footnote reference omitted).

Thus, whenever a party to an intercepted wire communication consents to the use of its contents -- whether

expressly, as in the Bragan case, or constructively, as in McQuade -- any such use cannot constitute a crime.

Moreover, the Act itself (§§ 2515 and 2518(10)(a)) contemplates some use of the contents of even illegal wire interceptions, at least for the purpose of permitting the trial court to determine their admissibility, which would necessarily require an examination of the contents of the intercepted communication, the scope of the evidence which was derived therefrom and the legality of the interception itself. As noted in McQuade, supra, in order to survive constitutional scrutiny, the statute must be construed as implicitly allowing certain other uses.[22]

Accordingly, in a variety of contexts, an attorney may utilize the contents of unlawful wiretaps without risking criminal prosecution. In the case sub judice, Wuliger's use of the recordings made by David Ricupero was limited to impeaching Polly Ricupero

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[22]In this context, it is important to note that, once Mrs. Ricupero's attorney alleged that she was "apparently" unaware of the recording of one "particular" conversation, it was essential that Wuliger explore in discovery the nature of her awareness or unawareness of the recordings, which he in fact attempted to do at both Wilhelm's and Mrs. Ricupero's depositions. Moreover, as noted above, use of the contents of even an unlawful interception is also permissible for purposes of impeachment.

and to exploring issues such as Polly Ricupero's knowledge of and/or consent to the recording (as a matter of defense to his client's potential liability under the Act and to lay a foundation upon which the trial court could ultimately base its admissibility ruling).

Moreover, a party who unjustifiably fails to make a timely motion to suppress, pursuant to § 2518(10)(a), waives the right to contest the admissibility of even a clearly unlawful wiretap. E.g., United States v. Scavo, 593 F.2d 837 (8th Cir., 1979); United States v. Johnson, 539 F.2d 181 (D.C. Cir., 1976), cert. denied 429 U.S. 1061; United States v. Sisca, 503 F.2d 1337 (2nd Cir., 1974), cert. denied 420 U.S. 1005. In each of those cases, the prosecutors used apparently unlawful wiretap information following the defendant's waiver. It would be absurd to conclude that any of those prosecutors could have been criminally prosecuted for properly using the contents of such wire interceptions after the defendant's waiver. In the instant case, at any point during the divorce proceedings, Polly Ricupero and/or her attorney could have moved the trial court for a protective order or for suppression relative to the contents of her telephone communications. Rules

26(C) and 30(D) of the Ohio Rules of Civil Procedure; §§ 2515, 2518(10)(a). As an alternative, federal injunctive intervention could have been sought pursuant to § 2521. However, no such action was taken. Tr. 484, 614. In light of this waiver and the agreement of counsel that the contents of these tapes could be used by Wuliger, his use of these recordings cannot be deemed a crime.

In rejecting this waiver argument, the Sixth Circuit suggested that, although a party's waiver may render the contents of a wire interception admissible in civil proceedings, that question was irrelevant to the issue of whether an attorney's use of such information following a waiver is criminally sanctionable. Thus, the Sixth Circuit's opinion herein suggests that the Act can provide that a waiver may render unlawfully intercepted information admissible into evidence and, at the same time, provide that criminal liability will result when an attorney fulfills his ethical obligations to his client by presenting or using that admissible evidence on his client's behalf. Appellant respectfully submits that this statute may not be reasonably construed to mean that an attorney may use admissible evidence in judicial proceedings and yet be held criminally liable for doing so.

In ruling as it did, the Sixth Circuit has created new law with vast implications on issues which are central to the application of this statute. On that basis and on the basis that the Sixth Circuit's ruling diverges significantly from the law of other federal jurisdictions, Petitioner submits that certiorari should be granted herein.

IV. THE SIXTH CIRCUIT'S RULING IS IN CONFLICT WITH DECISIONS OF THE SECOND, FIFTH AND ELEVENTH CIRCUITS IN REFUSING TO RECOGNIZE THAT IT DOES NOT CONSTITUTE A CRIME FOR A PERSON TO INTERCEPT CALLS OF HIS SPOUSE BY PLACING AN INTERCEPTION DEVICE ON AN EXTENSION LINE IN THE MARITAL HOME WHILE THE PARTIES WERE RESIDING TOGETHER AS HUSBAND AND WIFE.

By 1989, a number of federal and state courts had determined that the wiretap act does not render unlawful an interception of one spouse's wire communications by the other spouse on an extension line in the marital home, at least while the couple still reside therein as husband and wife. E.g., Anonymous v. Anonymous, 558 F.2d 677 (2nd Cir., 1977); Simpson v. Simpson, supra; Perfit v. Perfit, 693 F. Supp. 851 (D. Cal., 1988); Lizza v. Lizza, 693 F. Supp. 529 (E.D.N.Y., 1986); Baumrind v. Ewing, 276 S.C. 350, 279 S.E.2d 359 (1981) cert. denied 454 U.S.

1092; Beaber v. Beaber, supra. These opinions were based upon two distinct rationales, utilized either separately or in combination, i.e. the tort doctrine of interspousal immunity and the "extension line exception" provided for in § 2510(5)(a)(i).[23] See also, Epps v. St. Mary's Hospital of Athens, Inc., 802 F.2d 412 (11th Cir., 1986), rehearing denied 807 F.2d 999.

Clearly, if David Ricupero's interception of his wife's wire communications was lawful, then Wuliger cannot be criminally liable for his use thereof. E.g., Farroni v. Farroni, 862 F.2d 109 (6th Cir., 1988).

Appellant is aware that various other appellate courts have determined that there is no statutory exemption for interspousal taps.[24] However, due to the continuing split among federal and

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[23]Pursuant to 18 U.S.C. § 2510 (4), "intercept" is defined as the "...acquisition of the contents of any wire... communication through the use of any electronic, mechanical, or other device..." However, section 2510(5)(a)(i) excludes from the definition of device "...any telephone... furnished to the subscriber or user by a provider of wire or electronic communication service... and being used by the subscriber or user in the ordinary course of its business..."

[24]E.g., Fultz v. Gilliam, 942 F.2d 396 (6th Cir., 1991); Kempf v. Kempf, 868 F.2d 970 (8th Cir., 1989); Pritchard v. Pritchard, 732 F.2d 372 (4th Cir., 1984). Other courts have reached the conclusion that some nonconsensual interceptions by family members are lawful (i.e., interceptions of calls between children

state courts and the lack of any dispositive resolution of this question by this Court, Petitioner submits that it is important for this Court to grant this Petition and decide this question which continues to divide federal appellate courts.

V. THE SIXTH CIRCUIT'S RULING MISINTERPRETED THE PROVISIONS OF 18 U.S.C. §§ 2515, 2518(10)(a) AND 2520(d)(1), TO THE EFFECT THAT AN ATTORNEY WHO PRESENTS UNCONTROVERTED EVIDENCE OF HIS GOOD FAITH IS ENTITLED TO A JUDGMENT OF ACQUITTAL ON CHARGES BROUGHT PURSUANT TO 18 U.S.C. § 2511(1)(d).

In criminal prosecutions, the Government must prove all elements of charged offenses (Mullaney v. Wilbur, 421 U.S. 684 (1975)), and thus bears the burden of disproving any defense which bears a necessary relationship to an element of the charged offense (Patterson v. New York, 432 U.S. 197 (1977)).

Moreover, as recognized in Gorin v. United States, 312 U.S. 19 (1941), a criminal statute based upon a defendant's

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and an estranged spouse), whereas other intra-family interceptions constitute criminal activity (i.e., interceptions by one spouse of another) Compare Newcomb v. Ingle, 944 F.2d 1534 (10th Cir., 1991), cert. denied 112 S.Ct. 903 (1992), with Heggy v. Heggy, 944 F.2d 1537 (10th Cir., 1991), cert. denied 112 S. Ct. 1514 (1992). Although the Act itself does not differentiate among such categories, these cases nevertheless evidence the difficulty that federal courts are having in construing this statute.

"knowledge or reason to know" demands a showing of actual knowledge, intent or bad faith. Thus, in the case at bar, the question of Wuliger's good faith bore a necessary relationship to an element to the offense charged under § 2511(1)(d), which defines its mental element in terms virtually identical to those considered by the Supreme Court in Gorin. See also, Petric v. State, 66 Md. App. 470, 504 A.2d 1168 (1986), cert. denied 306 Md. 289, 508 A.2d 489, cert denied 479 U.S. 860, rehearing denied 479 U.S. 1001. Thus, the Government should have been required to disprove Wuliger's good faith,[25] which was established in a number of respects, to wit: (1) David Ricupero's trial testimony that he told Wuliger these recordings were consensually acquired; (2) Polly Ricupero's sworn deposition testimony that she knew of the wiretap and engaged in certain misleading telephone communications for the sole purpose of having her husband listen to them; (3) The testimony of Mrs. Ricupero's attorney to the effect that, in the presence of his clients, he agreed that Wuliger could use the recordings in discovery, with the understanding that the divorce

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[25]18 U.S.C. § 2520(d)(1) establishes good faith reliance on a court order or legislative or statutory authorization as a "complete defense" to criminal liability under the wiretap act.

court would ultimately determine the contested issue of admissibility; (4) The presence of a statutory mechanism (i.e., §§ 2515 and 2518(10)(a)) for presenting such a record for an admissibility ruling by the trial court; (5) The failure of Polly Ricupero, through her attorney, to challenge the use of these recordings via a motion for protective order, a motion to suppress, a motion for an order in limine or a federal action for an injunction, thus creating a waiver as to Wuliger's use of these recordings; (6) The reasonableness of the legal argument that even nonconsensual recordings are lawful when they result from an interspousal wiretap on an extension line within the marital home while the spouses continue to reside together as husband and wife; and (7) Wuliger's obligations as an attorney to zealously represent his client in accordance with Ohio's Code of Professional Responsibility -- both as to the substantive issues involved in the divorce case and issues relating to the potential civil and/or criminal liability of Wuliger's client pursuant to the Act.

Petitioner submits that the uncontroverted evidence as to any one of these factors mandated a judgment of acquittal. However, the Sixth Circuit ignored the inconsistency of interpreting

this Act to mean that, following a waiver, unlawfully intercepted information is admissible and yet, somehow, the lawyer who fulfilled his duties by presenting the admissible evidence may be criminally prosecuted for doing so. The Sixth Circuit also erroneously held that, on the basis of legislative history, the good faith defense contained in § 2520 was only intended to protect telephone companies and others who cooperate under a court order with law enforcement officers. Interestingly, the plain meaning of § 2520(d)(1) is not so limited. Rather, it applies to anyone who acts in good faith. Since "plain meaning" was the Sixth Circuit's standard for deciding all other issues, the same rule of construction should have been applied to this issue.

The interplay of Wuliger's ethical obligations and the division among federal and state courts as to the existence of a spousal or extension line exception to the Act is central to the question of whether Wuliger, in his role as advocate, could have known or had reason to know that the interceptions or his use thereof were in violation of law. Clearly, there was no uniform interpretation of federal law governing spousal wiretaps. Moreover, if there was any indication at all in 1989 as to what the position of

this Court would be on this issue, it was reflected in the fact that it had denied certiorari in the very case which had first established the spousal exception to the Act. Simpson v. Simpson, supra. In addition, Ohio domestic relations courts were allowing the use at trial of interspousal wiretap recordings or of information derived therefrom for purposes of impeachement or following a waiver by the opposing party. E.g. Cooper v. Cooper, supra; Beaber v. Beaber, supra.

Wuliger was aware of the Simpson decision since the early 1980's due to an inter-office memorandum on a related issue that had been prepared for one of Wuliger's previous cases. Tr. 860-71.

In addition to this judicially recognized good faith defense, the Act itself provided Wuliger with a complete defense based upon his good faith reliance on a court order, or a legislative or statutory authorization. § 2520(d)(1). Ohio's Code of Professional Responsibility is essentially both a court order and a legislative authorization, as was essentially acknowledged by the Sixth Circuit in its opinion. In reliance upon the provisions of Canon 7 thereof, Wuliger in good faith used the contents of Polly Ricupero's wire communications in the confines of formal legal proceedings on

behalf of his client. A second such authorization for such use is set forth in the wiretap act itself, via the mechanism by which a trial court may determine whether such evidence should be admitted or suppressed. §§ 2515, 2518(10)(a).

Certainly, at least some lawful uses of information derived from even unlawful wiretaps are contemplated by the Act. For instance, attorneys representing an individual who is sued under the provisions of § 2520 has at least a limited right to use such information, as noted in McQuade, supra.[26]

Thus, certiorari is warranted herein so that this Court may consider the question of whether the Sixth Circuit has promulgated an erroneously narrow interpretation of the provisions of the Act relating to the statutory good faith defense.

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[26]In the case at bar, despite David Ricupero's representations as to the consensual nature of the recordings, there would still be a risk -- however minimal and unlikely it may have appeared at the time -- that the tapes could potentially become the subject of a civil action or criminal prosecution against Wuliger's client, especially in view of Mrs. Ricupero's clear hostility and propensity to misrepresent herself. Thus, in addition to the necessity of using these recordings for purposes of impeaching Polly Ricupero's credibility in the divorce action, David Ricupero's interest also demanded that Wuliger explore, in discovery, the extent of Polly Ricupero's knowledge of or consent to the interceptions.

VI. THE SIXTH CIRCUIT'S INTERPRETATION AND APPLICATION OF 18 U.S.C. § 2511(1)(D) COMPRISED AN UNCONSTITUTIONAL INTRUSION UPON MATTERS CONSTITUTIONALLY RESERVED TO THE STATES AND UPON FUNDAMENTAL RIGHTS WHICH ARE ESSENTIAL TO THE INDEPENDENCE OF THE JUDICIARY AND THE BAR AND THE VIABILITY OF THE ADVERSARY SYSTEM.

In the course of representing a client's interests, a substantial portion of an attorney's role involves the gathering and presentation of evidence in the course of litigation, developing a legal theory for the prosecution or defense of a claim and arguing his client's position to the court. In carrying out these functions, a lawyer is necessarily concerned with making choices based upon any reasonably arguable position which may prove beneficial to his client's cause. Although the ultimate goal of the adversary system is the ascertainment of the truth, it is not the office of the advocate to tailor his case to his personal conception of the truth or to what he speculates will be the trial court's perception of the truth. The advocate's role is necessarily non-judicial in nature: He does not pre-judge the merits of his client's factual allegations or legal arguments in terms of whether they are likely to be deemed true or viable by a court of law upon the completion of the case. Rather, the advocate's duty is to attempt to present to the judicial officer

any evidence or theory which is arguably viable, subject to standards of good faith and reasonableness.[27] His role in the adversary process is not to pre-censor his client's case, but to zealously pursue and advocate any colorable position in support of his client's cause.

Thus, when an attorney is charged, under § 2511(1)(d), with using the contents of a wire communication, "knowing or having reason to know" that it was obtained unlawfully, the question of his knowledge must be measured by standards significantly different from those which apply to individuals who have no such professional obligations. A layman who uses the contents of a wire communication may logically be charged with the duty to decide on an objective basis whether it is probable that the interception was made in violation of federal law. A lawyer, on the other hand, may -- and should -- rely on the factual representations of his client regardless of his personal opinion as to the credibility thereof. Similarly, he must proceed under any

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[27]These principles are expressly or implicitly recognized and countenanced in a variety of enactments. E.g., Ohio Code of Professional Responsibility, EC 7-2, 7-3, 7-4, 7-19; Ohio Revised Code, Section 2323.51; Rule 11 of the Ohio Rules of Civil Procedure; Rule 11 of the Federal Rules of Civil Procedure.

favorable legal theory which can be supported in good faith, even if it is contrary to existing law. To fulfill his role in the adversary system, Wuliger had to proceed to the basis that his client was telling him the truth when he represented that Polly Ricupero knew that her calls were being recorded.

Under the circumstances of this case, it was incumbent upon Wuliger to use these tapes, not only to prepare his client's divorce case, but also to protect his client against any future criminal or civil liability arising from the recordings. It was certainly arguable in good faith that the tapes were consensually made and, therefore, both lawful and admissible. Even if there had been no evidentiary support for that position, it was nevertheless arguable in good faith that the tapes were lawfully obtained or usable for the numerous reasons set forth above which are irrelevant to the issue of consent.

Moreover, as held by the only court which has reached this issue, an attorney's use of intercepted information does not violate the Act unless the attorney is aware of sufficient facts regarding the circumstances of the interception such that he could determine that the interception was unlawfully obtained. Thompson v. Delaney,

970 F.2d 744 (10th Cir., 1992); accord, Liparota v. United States, 471 U.S. 419, at 425 (1985). In the case at bar, there was no dispute that Wuliger was in fact unaware of such circumstances.

The position of the prosecution and the trial court was that an attorney's duties to his client must be abandoned whenever there is any risk that recordings were made in violation of the Act. The Sixth Circuit rejected that view, but refused to hold that an attorney must be completely insulated from criminal culpability for merely cross-examining an opposing party during legal proceedings, in conformity with his ethical obligations, the law established by the courts of his State and existing precedent from federal circuits (which admittedly were divided and remain divided on a number of significant issues). Appellant submits that such a construction constituted an impermissible intrusion into the power of the courts to regulate evidentiary matters and the power of the States to regulate the conduct of attorneys, in contravention of the separation of powers doctrine and the Tenth Amendment to the Constitution of the United States.[28]

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[28]It also contravenes the provisions of 18 U.S.C. § 2515 and 2518, which provide for some use of even illegal wiretap information for purposes of determining admissibility or

The scope of the Tenth Amendment reservation of powers has been the subject of continuing debate in this Court since its decisions in National League of Cities v. Usery, 426 U.S. 833 (1976) and the case which overruled it, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In dissenting opinions, Justice O'Connor, for instance, has argued that "...each State is sovereign within its own domain, governing its citizens and providing for their general welfare..." (FERC v. Mississippi, 456 U.S. 742, at 777 (1982)) and that "...the autonomy of a State is an essential component of federalism." (Garcia v. San Antonio Metro. Transit Auth., supra, at 570). Moreover, in arguing for a re-affirmance of the principle set forth in National League of Cities v. Usery, supra, Chief Justice Rehnquist stated as follows, in a separate dissent:

> ...[T]he judgment in these cases should be affirmed, and I do not think it is incumbent on those of use in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court. Garcia v. San Antonio Metro. Transit Auth., supra at 580.

In the case at bar, the Sixth Circuit's interpretation

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suppression.

intruded, in several ways, on important powers constitutionally reserved to the States. First, by allowing for the prosecution of an attorney based upon his good faith use of evidence during state court proceedings, the ruling below will inevitably result in attorneys ignoring the provisions of Canon 7 of Ohio's Code of Professional Responsibility in order to avoid potential criminal liability. As such, the Sixth Circuit's approach is, thus, an unconstitutional intrusion into a State's prerogative to regulate the conduct of attorneys who practice within its judicial system. Accord, **Silverman v. Browning**, 414 F. Supp. 80 (D. Conn., 1976), aff'd 429 U.S. 876; **Moity v. Louisiana State Bar Ass'n**, 414 F. Supp. 180 (E.D. La., 1976), aff'd 537 F.2d 1141 (5th Cir.); **Dixon v. Georgia Indigent Legal Services, Inc.**, 388 F. Supp. 1157 (S.D. Ga., 1975).

Second, by interpreting this statute as imposing criminal sanctions on attorneys, judges, jurors and court reporters for their several uses of information ultimately found to have been unlawfully obtained, the trial court created a federal monster which could threaten to devour a State's traditional power to regulate its own judicial system. The resulting chilling effect upon everyone

in the judicial system is simply too far-reaching to justify this federal intrusion. Accord, Scheib v. Grant, supra.

Third, the Sixth Circuit's ruling as to the absence of exceptions for impeachment use, waiver, consent-to-use and interception between spouses constitutes a severe intrusion into the decision-making process of the State judiciary. Accordingly, despite the division among the courts, a State court judge would not be free to admit such evidence based on its conclusion that spousal interceptions, impeachment uses and uses following consent or waiver are exempted from the scope of the Act. This leads to the absurd conclusion that a State or even a federal judge may be subject to criminal sanctions for failure to adhere to legal precedent established by the corresponding federal Circuit Court, rejected by other Circuits and never decided by this Court.[29]

Moreover, under the Sixth Circuit's interpretation, the

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[29]The resulting chilling effect upon the judiciary is dramatically illustrated in Farroni v. Farroni, supra, in which Judge Ross D. Avellone of the Domestic Relations Court of Lake County, Ohio was sued civilly, under 18 U.S.C. § 2520, for denying the plaintiff-wife's motion in limine to exclude recordings resulting from a wiretap by her husband. Upon the filing of that civil suit, Judge Avellone reversed his previous evidentiary ruling, granted the wife's motion in limine and recused himself from the case.

Judicial Branch would be deprived of its traditional and essential powers to regulate the conduct of attorneys appearing before it and to decide questions regarding the admissibility of evidence in accordance with its understanding of the law, even where that understanding may be in error. These decisions would, rather, be made ex post facto by the Department of Justice, which would then be the ultimate supervision of both the bar and the judiciary.

Accordingly, for the foregoing reasons, Petitioner respectfully submits that the Act, as construed and applied by the Sixth Circuit, sweeps too broadly and unconstitutionally intrudes upon the sovereign provinces of the States and the traditional separate role of the judiciary vis-a-vis their regulation of attorneys, judges and the functioning of the judicial system. Therefore, Petitioner submits that this case presents significant constitutional issues which warrant this Court's review.

VII. THE SIXTH CIRCUIT'S RULING, IN RETROACTIVELY APPLYING NOVEL INTERPRETATIONS OF TITLE III, WHICH ARE INCONSISTENT WITH OR CONTRARY TO BOTH STATE AND FEDERAL LAW EXISTING AT THE TIME OF THE OFFENSES CHARGED, CONSTITUTES A DENIAL OF DUE PROCESS OF LAW.

Until Wuliger's conviction was appealed, the Sixth Circuit

had never decided whether it is permissible for an attorney to use information from an unlawful wire interception to impeach an opposing party upon cross-examination. A number of other Circuits (i.e., the Fist, Fifth, Seventh and Ninth) had reached this issue and determined that such conduct was lawful, as had the courts of the State in which Wuliger was practicing. Similarly, the Sixth Circuit had never determined whether an attorney may use information from an interception after the subject of the interception had consented to such use. At least one other Circuit (i.e., the Fourth) had previously reached this issue and determined that such conduct was lawful. The Sixth Circuit had also never decided until this appeal whether an attorney may make evidentiary use of information from an interception following a party's waiver of his right to contest the admissibility thereof. Other jurisdictions (i.e., the Second, Eighth and D.C. Circuits) which had previously considered this issue had determined that evidence was admissible under such circumstances.

Finally, it must be noted that, as of 1989, the Sixth Circuit had never even determined whether there was an interspousal exception to the Act under circumstances where the spouses were

still living together within the marital home. In United States v. Jones, supra, the Sixth Circuit had suggested that it would be adverse to such a construction, but the fact remains that Jones did not involve an interception while the spouses were living together. The Fifth Circuit and various District Courts and state courts, on the other hand, had declared such interceptions lawful.

Thus, based on the law as it existed prior to the Sixth Circuit's ruling herein, Wuliger's conduct did not constitute criminal activity. Clearly, no other attorney in the twenty-five year history of this Act was ever prosecuted for using intercepted information to impeach an opposing party on cross-examination.[30] Furthermore, no attorney had ever been prosecuted for using such information where the subject of the interception had consented to the use or waived the right to contest the admissibility of such

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[30]Clearly, this is not an uncommon occurrence, as discussed in Section II above. Moreover, in the Ohio case of Fluherty v. Fluherty, unreported, C.A. Summit Cty., Case No. 8951 (11/29/78), the trial court had overruled the wife's motion to suppress the contents of her unlawfully taped conversations, which were used during the divorce proceedings for impeachment purposes. On appeal, the U.S. Attorney's office filed an amicus brief regarding the interceptions. However, neither in that case nor in any other case has the Justice Department ever prosecuted an attorney for such an impeachment use or any other use where the lawyer was not involved in the intercept.

evidence. Indeed, on the basis of one or another of the circumstances discussed immediately above, Wuliger could not have been prosecuted in the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits!

Petitioner respectfully submits that neither the Act itself nor the judicial interpretations of the Act which were in existence in 1989 provided notice that it would be considered criminal for an attorney under such circumstances to use such information for purposes of cross-examination.

Under those circumstances, to permit the ruling of the Sixth Circuit to have anything other than a prospective application would be to deprive Wuliger of due process of law. This is particularly so in the case of an attorney whose ethical obligation it is to pursue any reasonably arguable position, particularly where the boundaries of the law are unclear or uncertain. EC 7-, 7-3, 7-4.

Petitioner further submits that the position of the Sixth Circuit on these issues is incorrect, for the reasons set forth above and that such sweeping changes in the law are of sufficient magnitude to warrant this Court's attention. Accordingly, Petitioner respectfully requests that this Court issue a writ of certiorari herein.

CONCLUSION

In the court below, both the Government and the Ohio Association of Criminal Defense Lawyers, as amicus curiae, took the position that this case presents "novel and significant issues." Certainly, never before has this Court been presented with a Title III case which contains such a broad range of distinct and important issues in terms of defining the meaning and scope of the Act.

Moreover, this case presents significant constitutional issues which impact upon the independence and integrity of the judiciary and the bar, the separation of powers, and the traditional right of a state to regulate its own judicial proceedings and to control the conduct of members of its bar.

Finally, a decision by this Court on the various issues set forth herein will serve to resolve the many conflicts among the Circuits regarding the application of this statute and will, therefore, prevent the sort of selective prosecution that permits the Government to target certain individuals who engage in conduct which would be considered lawful in other jurisdictions but is deemed criminal by the Circuit Court with geographical jurisdiction over the charged offense.

Accordingly, Petitioner prays that this Court assert its jurisdiction and hear this case on the merits.

Respectfully submitted,

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No. 92-3061

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM T. WULIGER,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed December 22, 1992

Before: KENNEDY and MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. WELLFORD, Senior Circuit Judge (pp. 24-26), delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Defendant William T. Wuliger appeals the judgment of conviction and sentence for multiple violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, ("Title III" or the "Act"), 18 U.S.C. §§ 2510 - 2520. A jury convicted the defendant under section 2511(1)(d) for intentionally using the contents of telephone conversations recorded in

violation of section 2511(1)(a) on three separate occasions. The jury acquitted the defendant of a fourth use count under section 2511(1)(d) and of four charges under section 2511(1)(c) involving the intentional disclosure of the contents of wrongfully recorded telephone conversations. Defendant filed a motion to acquit after verdict which was denied. The District Court fined defendant $5,000 and placed him on probation for two years provided that he surrender his license to practice law and serve a thirty-day home detention. Execution of the sentence, other than the fine, was stayed pending disposition of this appeal. For the reasons stated below, we REVERSE the defendant's conviction and REMAND the case to the District Court for a new trial consistent with this opinion.

I.

Defendant, an Ohio attorney, was retained on April 4, 1989 by David Ricupero to represent him in a divorce action commenced by Ricupero's wife, Polly Ricupero, a.k.a. Polly Wilhelm. During a one-week period in mid-March of 1989, Mr. Ricupero intercepted and recorded all telephone calls at the Ricupero's marital home without Mrs. Ricupero's prior knowledge or consent by installing a wiretap device. Conversations between Mrs. Ricupero and her priest, her marriage counselor, her attorney and many of her friends were recorded. Mr. Ricupero was not a party to any of these communications.

These tapes were made in violation of Title III which criminalizes unauthorized, unconsensual wiretapping. Section 2511(1)(a) is the basis for liability and provides that "any person who intentionally intercepts [or] endeavors to intercept . . . any wire, oral, or electronic communication" shall be fined or imprisoned not more than five years.[1] Title III also makes any use or disclosure of the contents of a communication obtained in

[1]Mr. Ricupero was granted use immunity for his testimony in the defendant's trial and was not prosecuted under Title III.

violation of section 2511(1)(a) illegal, 18 U.S.C. § 2511(1)(c)-(d).

Mr. Ricupero gave these tapes to the defendant for use in the divorce proceedings and represented that he had recorded the telephone conversations with his wife's knowledge. When the defendant became aware that the tapes of the conversations were in fact made without the knowledge or consent of Mrs. Ricupero is disputed. The defendant had his secretary transcribe the tapes and had a law clerk prepare written summaries of their contents.

On April 10, 1989, a hearing was held in an Ohio state court on Mrs. Ricupero's charges of domestic violence by Mr. Ricupero. During the defendant's cross-examination of Mrs. Ricupero he used the written summaries of the transcripts in an attempt to impeach her testimony. This was the first time Mrs. Ricupero obtained actual knowledge that her husband had tapped the telephones. Counts 1 and 2 of the indictment charged the defendant with intentionally using and disclosing the contents of a wire communication in violation of Title III at this hearing. The defendant was acquitted of both of these charges.

The defendant was convicted on counts 4, 6 and 8 of the indictment for using the contents of the non-consensual recordings in violation of section 2511(1)(d) on three subsequent occasions.[2] The first was the May 24, 1989 deposition of Mrs. Ricupero. The defendant brought several audio tapes and folders filled with the written transcripts to the deposition. The defendant relied on the contents of the tapes to ask Mrs. Ricupero pointed questions about statements she allegedly made or that others made to her in telephone conversations recorded during March 1989. He also played the tapes themselves numerous times. Mrs. Ricupero's attorney, Carl

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[2]Counts 3, 5, and 7 charged the defendant with violating section 2511(1)(c) for disclosing the contents of the tapes on the same three occasions. The defendant was acquitted of these charges.

Murway, objected to the use of the tapes and their contents, but allowed the deposition to continue.

The defendant next used the contents of the tapes at the May 26, 1989 deposition of John Wilhelm, the man with whom Mrs. Ricupero was involved at the time and to whom she is now married. Relying on the transcripts, the defendant asked Mr. Wilhelm about a specific conversation he and Mrs. Ricupero allegedly had in March 1989 which had been recorded. Once again Mrs. Ricupero's attorney objected to this use of the tapes.

The third occasion on which the defendant used the contents of the recordings was the July 8, 1989 state court divorce hearing. The defendant used tape derived information to cross-examine Mrs. Ricupero on whether she had hidden marital money from her husband prior to the divorce.

The defendant admits that he intentionally used the contents of the recordings on these three occasions. He argues that his conduct was not criminal under the Act. The defendant alleges several errors in the court below. The defendant contends that the trial court wrongly interpreted section 2511(1)(d) and as a result committed plain error in instructing the jury that it could find guilt without finding that the defendant knew or had reason to know that the recordings were made in violation of the Act. The defendant also finds error in the court's instruction to the jury on the "reason to know" standard. He argues that the court should not have couched it in terms of reasonable foreseeability. In the alternative, he argues that a statute imposing criminal liability based upon a defendant's knowledge or reason to know is constitutional only if construed to require actual knowledge, intent or bad faith. The defendant also assigns as error the court's failure to give other jury instructions. Finally, the defendant alleges that the court committed reversible error by failing to give instructions related to several exceptions to Title III which the court refused to recognize.

II.

A. Knowledge or Reason To Know of the Violation

The standard of review in evaluating a claim of error in a trial court's charge to the jury is whether the charge, when considered as a whole, "fails accurately to reflect the law." *United States v. Busacca*, 863 F.2d 433, 435 (6th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). A trial court's exercise of its discretion in charging the jury will only be reversed if the instructions "taken as a whole" are "misleading" or give an "inadequate understanding of the law." *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991). When there is no objection to an instruction at trial, a defendant can only obtain relief if he can demonstrate "plain error," Fed. R. Crim. P. 30, 52(b), and if a "miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15 (1985). Plain errors are "limited to those harmful ones that are so rank that they should have been apparent to the trial judge without objection, or that strike at the fundamental fairness, honesty, or public reputation of the trial." *United States v. Driscoll*, 970 F.2d 1472, 1485 (6th Cir. 1992) (quoting *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987), *cert. denied*, 486 U.S. 1034 (1988)). Where, in formulating instructions, the "district court engages in statutory construction as a matter of law, . . . [the Sixth Circuit] review[s] [the] conclusions *de novo*." *Buckley*, 934 F.2d at 87-88 (quoting *United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990)).

With these standards in mind, we find that the District Court committed plain error in its instructions to the jury on the government's burden of proof under section 2511(1)(d). This section provides that:

> any person who . . . intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, *knowing or having reason to know that the information was obtained* through the interception of a wire, oral, or

> electronic communication *in violation of this subsection* [shall be fined or imprisoned].

18 U.S.C. § 2511(1)(d) (emphasis added). After reading this section to the jury, the court charged it to find the defendant guilty of violating section 2511(1)(d) if the government proved the following elements beyond a reasonable doubt:

> First, that on or about the date charged in the indictment, in the Northern District of Ohio, defendant William T. Wuliger did intentionally use or endeavor to use the contents of a wire communication.
>
> And, second, that defendant William T. Wuliger knew or had reason to know that the information which was used or endeavored to be used was obtained through the intentional interception of a wire communication.
>
> And, third, that the information used or endeavored to be used was obtained in violation of Title 18, United States Code, Section 2511(1)(a).
>
> Section 2511(1)(a) provides in pertinent part that: "Any person who intentionally intercepts or endeavors to intercept any wire communication shall be guilty of a criminal offense."

The charge required the jury to find only that the defendant knew or had reason to know that the information was derived from a wire interception. It did not require the jury to find that the defendant knew or had reason to know that the interception itself was in violation of Title III. As we interpret this section, however, knowledge or reason to know of the illegality is an element of this offense.

In *Liparota v. United States*, 471 U.S. 419 (1985), a food stamp case, the Supreme Court addressed the issue

of whether the government must prove that a defendant knew he was using food stamps in violation of a federal statute governing food stamp fraud. The statute, 7 U.S.C. § 2024(b)(1) (West 1988), provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or regulations" is subject to a fine and imprisonment. In *Liparota*, the government argued that a violation occurs when one acquires or possesses food stamps and that acquisition or possession is in fact unauthorized. The petitioner claimed that a violation occurs only if an individual knows that he has acquired or possessed food stamps *and* that he has done so in an unauthorized manner.

The Court found no guidance in the legislative history or the words themselves, as they lend themselves to either interpretation, on what type of mental element Congress intended for this crime. So it looked, as do we, to the significance of the *mens rea* requirement in our criminal law. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Liparota*, 471 U.S. at 425 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)). The Court further noted that "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)). Thus, the Court held that the food stamp fraud provision required both knowing use and knowledge of illegality. *Id.* at 425.

The Supreme Court's reasoning in *Liparota* guides this Court's interpretation of the mental element required under 18 U.S.C. § 2511(1)(d). The syntax of section 2511(1)(d) parallels that of the food stamp provision; the "knowing" requirement is followed by the "use"

requirement which is followed by the "illegality" requirement. The government wrongly asserts that "*Liparota* stands for the proposition that *if* knowledge of illegality is an essential element of the offense, then it must be charged by the court." Gov't Brief at 37. Indeed, the Supreme Court addressed the same problem of statutory interpretation presented to this Court, *i.e.*, whether knowledge of illegality is an element of the offense. The government presents no persuasive evidence that the legislative history of Title III distinguishes this case from *Liparota*.

Additionally, in *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), a case construing sections 2511(1)(c) and (d) of the Act, this Court assumed that knowledge of illegality was an essential element of these offenses. While discussing the scope of these sections the Court stated that "[b]y prohibiting all intentional uses and disclosures of unauthorized interceptions *by an individual with knowledge of the violation*, subsections (1)(c) and (d) strengthen subsection (1)(a) by denying the wrongdoer the fruits of his conduct." *Id.* at 401 (emphasis added).

The government cites *Fultz* to support the well accepted rule that ignorance or mistake of the law is no defense, in this case, to a violation of the Wiretap Act. The government seems to be arguing that by recognizing a knowledge of illegality requirement, this Court would be creating a mistake of law defense. This position is mistaken. If the defendant claimed ignorance that the use of nonconsensual recordings was illegal, that claim would be one of mistake of law. However, whether or not the defendant knew or had reason to know the interception in this case was nonconsensual and thus, illegal, is a question of fact.

The defendant admitted that he used the contents of the tapes and that he knew the information was obtained from an intentional wire interception. Mr. Ricupero told the defendant as much when he gave the defendant the tapes. Mrs. Ricupero testified that she did not know her husband had tapped the home phone and that she did not consent to

the recordings. Nonconsensual recordings violate the Act, 18 U.S.C. § 2511(1)(a).[3] Under these facts and the court's instructions, the only verdict the jury could return was guilty.

Under these instructions, the government did not have the burden of proving that the defendant knew or had reason to know that the recordings were nonconsensual.[4] Mr. Ricupero testified that he told the defendant that the recordings were made with his wife's knowledge. Under the given instructions, the jury did not deliberate on whether or not the defendant knew or had reason to know that Mrs. Ricupero had not given her consent to the recording of her phone conversations, at the time he used the recordings.

The government argues that when viewed as a whole, the instructions adequately instruct the jury on the government's burden of proof. In its charge, the District Court discussed "proving the defendant's state of mind." The Court addressed how difficult it is to prove a person's state of mind directly, and that it may be proved indirectly with circumstantial evidence.

> You may find that the defendant acted knowingly if you find that he acted with a conscious purpose to avoid learning the truth. Stated another way, a defendant's knowledge of a fact may be inferred from his willful blindness to the existence of a fact. No one can avoid responsibility for a crime he may be committing by deliberately ignoring the obvious. A defendant

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[3]Consensual recordings do not violate Title III. The Act provides that it is not unlawful "for a person . . . to intercept a wire . . . communication . . . where one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d) (West 1970).

[4]The government did have the burden of proving that "prior to the interception of her calls, Polly Ricupero did not expressly or impliedly consent to the interception and recording of those telephone calls."

> cannot deliberately close his eyes to the obvious risk that he is engaging in unlawful conduct.

These instructions can be construed as referring to whether or not the defendant knew Mrs. Ricupero lacked knowledge that her phone was tapped. However, the instructions and the question of Mrs. Ricupero's knowledge were never so connected by the court. Nowhere in its instructions did the court instruct the jury that the government had to prove the defendant knew or had reason to know of her lack of consent. The court also stated that:

> The government is not required to prove the defendant's motive in engaging in the prohibited conduct, or that the defendant acted with a bad purpose, with an intent to violate the law.
>
> The government is also not required to prove that the defendant knew that he was violating the law when he allegedly disclosed or used the contents of the telephone conversations.

And "prohibited conduct" was defined by the court as knowing use of the contents of a recording which was *in fact* made in violation of the Act.

We find that by failing to instruct the jury that it had to find the defendant knew or had reason to know that the recordings were made in violation of the Act, the defendant was deprived of his only defense. The court's instructions were tantamount to directing a verdict against the defendant and amounted to plain error.

B. Reason to Know Standard

The court instructed the jury that a "person has reason to know of a particular fact or circumstance when there is a reasonable foreseeability of such a fact or circumstance." The defendant raises several issues regarding this instruction.

First, the defendant contends that a statute imposing criminal liability based upon a person's "knowledge or reason to know" may survive constitutional challenge only if construed to require actual knowledge, intent or bad faith. The defendant relies upon numerous cases to support this proposition. *Kansas Retail Trade Co-op v. Stephan*, 695 F.2d 1343, 1346 (10th Cir. 1982); *New England Accessories Trade Association, Inc. v. Tierney*, 691 F.2d 35, 36-7 (1st Cir. 1982); *Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen*, 681 F.2d 378, 385 n.16 (5th Cir. 1982); *New England Accessories Trade Association, Inc. v. City of Nashua*, 679 F.2d 1, 4-5 (1st Cir. 1982); *Florida Businessmen for Free Enterprise v. City of Hollywood*, 673 F.2d 1213, 1219 (11th Cir. 1982). These cases deal with statutes regulating the use and distribution of drug paraphernalia. The relevant section prohibited the delivery or manufacture of drug paraphernalia by one who knew or had reason to know that the item would be used to take drugs. The statutes were challenged on the "reason to know standard." The challengers alleged that a seller's criminal liability could be based on the unknown intent of a third party since a seller cannot know what the ultimate recipient intends to do with an item. The courts found that, based on a definitional section of the statutes, an item is only drug paraphernalia if the seller intends it to be sold for drug use. Only after finding this requisite intent on the part of the seller does the seller's constructive knowledge of its use by a buyer come into play. These cases *rejected* challenges to the "reason to know" standard and viewed as constitutionally proper "that the seller be required to open his eyes to the objective realities of the sale." *Stephan*, 695 F.2d at 1346.

There are numerous criminal statutes providing for criminal liability where the *mens rea* element is "reason to know." See *e.g.*, 18 U.S.C. § 1384 (prostitution near military establishments); 18 U.S.C. § 1546 (fraud and misuse of visas, permits, and other documents); 18 U.S.C. § 2251 (sexual exploitation of children). We find

that the reason to know standard is constitutionally sufficient as a basis for criminal liability.

Second, by couching the "reason to know standard" in terms of reasonable foreseeability, the defendant alleges that the court construed and applied section 2511(1)(d) in a manner as to render it unconstitutionally vague and overbroad. The government argues that Congress intended that the knowledge element of section 2511(1)(d) could be satisfied upon proof of actual knowledge or the "reasonable foreseeability" of a fact or circumstance.

The legislative history of Title III states that "[t]he scope of the knowledge required to violate [section 2511(1)(d)] reflects existing law," citing *Pereira v. United States*, 347 U.S. 1 (1954). In *Pereira*, the defendant was convicted of violating the mail fraud statute, 18 U.S.C. § 1341. The elements of section 1341 are a scheme to defraud, the mailing of a letter for the purpose of executing the scheme and proof that the defendant caused the mailing. The only question was whether Pereira "caused" the mailing. The Court found that one causes a mailing where 1) one acts with knowledge that use of the mails will follow, or 2) where such use can *reasonably be foreseen*, even though not actually intended.

We do not interpret *Pereira* as establishing that "reasonable foreseeability" *satisfies* the "reason to know" standard of section 2511(1)(d), as the government asserts. In the present case, the court instructed the jury to use reasonable foreseeability as a basis for finding that the defendant had reason to know a fact. "A person has reason to know of a particular fact or circumstance when there is a reasonable foreseeability of such fact or circumstance."

We agree with defendant that reasonable foreseeability does not satisfy the "reason to know" requirement as the above jury instruction appears to indicate. Reasonable foreseeability is only a factor to be considered with other

circumstantial evidence in determining whether one has reason to know a fact. Upon retrial, the court should focus on defendant's reason to know rather than on whether it was reasonably foreseeable that Mrs. Ricupero would or would not consent. We are not concerned here with future conduct where foreseeability of what others will do is relevant.

In a related issue, the defendant argues that due to an attorney's professional obligations, attorneys are entitled to a special instruction on the "reason to know" standard.[5] The defendant asserts that as an advocate his role is not to pre-judge the merits of his client's factual allegations. Mr. Ricupero represented to the defendant that the tapes were made with his wife's knowledge, in which case they would not violate Title III. The defendant argues that he should be able to rely on the factual representations of his client regardless of his personal opinion as to the client's credibility. He points to his professional duty to present any evidence or theory which is arguably viable, subject to standards of good faith and reasonableness.[6] Because he proceeded on the belief his client was telling the truth, the defendant contends he had no "reason to know" Mrs. Ricupero did not in fact consent to the recordings.

There is nothing in the Act which affords attorneys special treatment. Accordingly, we find that the

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[5]The defendant proposed the following instruction:

> 1. A lawyer, in the performance of his duties, has a right to rely upon information furnished by his client and to act upon such information.
>
> 2. A lawyer, in the performance of his duties, cannot be expected to accept factual allegations made by the opposing party in pending litigation as truth if he has reason to believe they may not be true. Likewise, a lawyer cannot be expected to accept legal arguments made in pending litigation as true if he does not in good faith believe that they are supported by the facts or any permissible construction of the law favorable to his client.

[6]See *e.g.*, Ohio Code of Professional Responsibility, EC 7-2, 7-3, 7-4, 7-19.

defendant was not entitled to a special instruction on the reason to know standard solely because he used the tapes in his role as attorney. However, an attorney's professional duties may be a factor in determining whether there is reason to know that recorded information, given by the client, was illegally obtained. Although an attorney must not turn a blind eye to the obvious, he should be able to give his clients the benefit of the doubt. This countervailing duty is one the jury may take into account in deciding whether defendant had reason to know.

III.

The defendant argues that the trial court erred in failing to recognize various exceptions to the application of Title III and thus failed to instruct the jury on the defenses provided by these alleged exceptions. A district court's refusal to deliver a requested instruction is reversible only if that instruction is 1) a correct statement of the law, 2) not substantially covered by the charge actually delivered to the jury, and 3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense. *United States v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991). We find that the District Court correctly refused to recognize the asserted exceptions to the Act, and uphold the Court's decision to refuse defendant's proposed instructions.

A. Impeachment Exception to Section 2515

Section 2515 of the Wiretap Act serves as an exclusionary rule. It prohibits any information obtained from a wiretap from being introduced into evidence "in any trial, hearing, or other proceeding in or before any court . . . or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515.

The Fifth Circuit was the first to recognize an impeachment exception to this rule in *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973). Since then, three other circuits have addressed this issue and have followed the Fifth Circuit in recognizing this exception. *See, United States v. Echavarria-Olarte*, 904 F.2d 1391 (9th Cir. 1990); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

In finding an impeachment exception to exist, the Fifth Circuit looked to section 2515's legislative history which specifically cites *Walder v. United States*, 347 U.S. 62 (1954). The passage explicitly states that section 2515 "reflects existing law" and there is "no intention to . . . press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States*, 347 U.S. 62 (1954)." S. Rep. No. 1097, 90th Cong., 2d Sess. 1 (1968), reprinted in 2 U.S. Code Cong. & Admin. News 2112, 2185 (1968). *Walder* was the first case to establish an impeachment exception to the Fourth Amendment exclusionary rule. It involved a perjury prosecution in which the government used illegally seized evidence to impeach the defendant. Likewise, in *Caron*, the defendant was indicted for giving false testimony to the grand jury. The prosecution introduced into evidence recordings of conversations to which the defendant was a party without a prior evidentiary hearing on their validity.

The use of this exception to section 2515 has been limited thus far to government prosecutors. The defendant requests both that this Court follow the Fifth Circuit in recognizing the impeachment exception, and that we extend its availability to private individuals.

Whether or not an impeachment exception exists at all is an open question in this Circuit. The plain language of section 2515 allows for no exceptions to its reach. "[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489

U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). In *United States v. Vest*, the First Circuit stated that:

> [W]e believe that if Congress had intended to commit the courts general authority to create exceptions to section 2515 in the same manner as the courts might develop future exceptions to the fourth amendment exclusionary rule, Congress could certainly have said so more clearly.

813 F.2d at 482. However, assuming that an exception exists in the criminal law based on Congress' express approval in the legislative history to the continued use of illegally obtained wiretap evidence for impeachment purposes by the government in criminal cases, we see no basis to create such an exception in civil actions between private parties.

Recently, this Court laid out the purposes of the Wiretap Act.

> Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) *delineating on a uniform basis the circumstances and conditions* under which the interception of wire and oral communications may be authorized.
>
> [A]lthough Title III authorizes invasions of individual privacy under *certain circumstances*, the protection of privacy was an overriding congressional concern.

Fultz v. Gilliam, 942 F.2d 396, 401 (6th Cir. 1991) (citations omitted; emphasis added).

In light of this overriding concern for protection of privacy, and because the Act sets out when certain uses or disclosures of wiretap material are authorized, it may be implied that "what is not permitted is forbidden." *Id.* at 402. Therefore, since section 2515 allows for no

exceptions, we refuse to recognize an impeachment exception to section 2515 in *civil* proceedings. The greater value to society to learn the truth in criminal cases where it may be discovered by impeaching materials, even if unlawfully obtained, may outweigh the individual rights to privacy. While in the civil context, it is principally the individual rights that are at issue and Congress has balanced the scale in favor of the right of privacy.

An additional consideration for treating civil and criminal cases differently is that evidence of impeachment in criminal cases, with very limited exceptions, occurs at the trial under the supervision of the court. This is not true in civil cases where there is extensive impeachment at depositions. Most use of wiretaps--when not used for tortious or criminal purposes which are covered by other sections of the Act--will be in litigation and for impeachment. A blanket impeachment exception would swallow up the statutory prohibition.

B. Interspousal Exception

Next, the defendant contends that the trial court's failure to instruct on the conflicting interpretations of Title III, concerning the existence of an interspousal wiretapping exception to section 2511(1)(a), was error. "[T]he unlawfulness of interspousal wiretapping has been a settled point of law in this Circuit since our decision in [*United States v. Jones*, 542 F.2d 661 (6th Cir. 1976)]." *Fultz*, 942 F.2d at 404. Concededly, in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), the Fifth Circuit held that section 2511(1)(a) was not intended to prohibit purely interspousal wiretaps placed on telephones in the marital home. The *Jones* Court rejected this view. Unlike the Fifth Circuit, this Court was unwilling to look beyond the language of section 2511(1)(a) which clearly expresses a blanket prohibition on all electronic surveillance (except under

circumstances specifically enumerated in the statute).[7] We are bound to follow *Jones*. There is no interspousal exception to the Act.

The defendant proposed the following instruction:

> Even though you have been instructed that tapping a telephone in the marital residence while the spouses live together is not legal, you may consider the evidence that the federal courts are in disagreement on this issue when determining whether Wuliger knew or had reason to know that the taps involved in this case were illegal.

The defendant alleges that in his research he discovered the *Simpson* case, and cases indicating that Ohio domestic relations courts were allowing the use at trial of interspousal wiretap recordings or of information derived therefrom. *E.g.*, *Beaber v. Beaber*, 41 Ohio Misc. 95, 322 N.E.2d 910 (Ohio Com Pl., 1974). He submits that because of this precedent, he believed that the tapes Mr. Ricupero made were legal and therefore the existence of these cases bore on his knowledge or reason to know whether the tapes were made in violation of the Wiretap Act.

Due to this mistake, the defendant contends that he did not possess the requisite knowledge to violate section 2511(1)(d). In *Fultz*, 942 F.2d at 396, we addressed a very similar issue under section 2511(1)(c) which prohibits disclosure of the contents of an intercepted communication, by an individual knowing or having reason to know that the information was obtained through an interception in violation of Title III. The defendant in *Fultz* asserted that "not even the Circuit Courts are in agreement whether interspousal wiretapping is a violation of the Federal Wiretapping Act or is excluded." *Id.* at 404. The Court rejected the defendant's argument that he

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[7] *See*, 18 U.S.C. §§ 2510(5)(a), 2511(2)(a)(i), 2511(2)(a)(ii), 2511(2)(b)-(e).

lacked the requisite mental state because the argument was premised on a mistake of law, which has long been recognized as no defense to a criminal prosecution. *See Cheek v. United States*, 498 U.S. 192, ___, 111 S. Ct. 604, 609 (1991).

We interpret the defendant's proposed instruction as a request for a mistake of law defense and, therefore, find that the District Court did not err in refusing to give it.

C. Good Faith Defense

Next, the defendant claims that there is a statutory "good faith" defense which authorized his conduct. To support his theory, he cites section 2520(d), which provides in pertinent part that:

> a good faith reliance on . . . a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . . is a complete defense against any . . . criminal action brought under this chapter . . . .

18 U.S.C. § 2520(d). The defendant then asserts that because the Ohio Code of Professional Responsibility is both a court order and a legislative authorization, he is entitled to an acquittal since he "relied on" the Code in deciding whether or not to use the tapes. Nothing in the Code "authorizes" the defendant to violate Title III in carrying out his professional duties. The defendant's reliance on section 2520 is mistaken; it is not applicable to this case. This defense was intended in part to protect telephone companies or others who cooperate under court order with law enforcement officials. *Jacobson v. Rose*, 592 F.2d 515, 522-23 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979).

D. Consent to Use Defense to Section 2511(1)(d)

The defendant further assigns as error the trial court's failure to recognize a "consent to use" defense. No crime

is committed under the Act by one who intercepts and records a telephone conversation with the prior consent of one of the parties. 18 U.S.C. § 2511(2)(d). The defendant submits that even though the statute does not explicitly so provide, it is similarly no crime for one to use or disclose information from an illegal intercept where one of the parties consents to such use or disclosure.

The defendant cites *United States v. Bragan*, 499 F.2d 1376 (4th Cir. 1974), in support of this view. The *Bragan* court found that "[b]ecause Bragan's victims consented to the introduction into evidence of their wiretapped conversation, the exclusionary rule of 18 U.S.C. § 2515 did not render inadmissible the wiretaps Bragan made in violation of 18 U.S.C. § 2511." *Id.* at 1380 (footnote omitted). But a careful reading of this case indicates that the court admitted the contents of the recordings into evidence not because the victims consented to their *admission*, but rather, because they consented to the *recording* itself. *Id.* The statute does not expressly provide a "consent to use" exception to section 2511(1)(d).

Additionally, the defendant contends that because Mrs. Ricupero consented to the use of the recordings and failed to make a motion to suppress, she waived the right to contest the admissibility of the wiretap under section 2518(10)(a). This section provides that:

> Any aggrieved person in any . . . proceeding in or before any court, . . . may move to suppress the contents of any . . . communication intercepted pursuant to this chapter . . . on the grounds . . . that the communication was unlawfully intercepted . . . .
>
> Such motion shall be made before the . . . proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

18 U.S.C. § 2518(10)(a). This section is not applicable to this case. It could apply if Mrs. Ricupero was contesting the admissibility of the recordings in a civil suit, but we are not concerned with the rights of Mrs. Ricupero. This case involves the criminal prosecution of Mr. Wuliger and thus the notion of waiver is irrelevant.

E. Instruction on Mr. Ricupero's Credibility

Next, the defendant claims as error the trial court's failure to give the defendant's proposed jury instruction number 12. This instruction provided an explanation that a grant of immunity did not grant witnesses any license to give false testimony or to commit perjury or obstruction of justice.[8] The trial court instructed the jury that because Mr. Ricupero was given use immunity in exchange for his *truthful* testimony, it should consider his testimony with more caution and whether this promise could have influenced his testimony.

The defendant argues that the court should not have given this "grain of salt" instruction because the immunized testimony exculpated the defendant. Mr. Ricupero testified that when he presented the tapes to the defendant he represented that his wife knew he had recorded them. The defendant asserts that this exculpatory testimony was contrary to the wishes of the entity granting the immunity, and his testimony should have been given even more credence by the jury.

The government counters that the testimony inculpated the defendant. Mr. Ricupero admitted that when he

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[8]The defendant proposed the following instruction:

> You have heard testimony that some witnesses . . . were given immunity. These witnesses were told that their testimony would not be used against them if they are prosecuted for intentionally intercepting the conversations of Polly Ricupero and others, provided they give truthful testimony. They were not given immunity to give false statements or to commit perjury or the obstruction of justice.

installed the wiretap device he did not have his wife's permission to do so. But this testimony doesn't establish that the *defendant* knew of this fact. In terms of what the defendant knew, Mr. Ricupero's testimony shows only that he told the defendant that the tapes were made with his wife's knowledge. Because the testimony was exculpatory, the instruction was inappropriate. However, because the Court instructed the jury that Mr. Ricupero was given immunity in exchange for his *truthful* testimony, we find that the failure to give the defendant's requested instruction did not substantially impair the defendant's defense.

IV. Denial of Motion For Judgment of Acquittal

The defendant asserts that the trial court's denial of his motion for judgment of acquittal after the verdict, Fed. R. Crim. P. 29(c), is grounds for reversal. This Court must review the denial of a motion for acquittal *de novo* under the standard of "whether, after reviewing all the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *United States v. Busacca*, 936 F.2d 232, 239 (6th Cir.), *cert. denied*, 112 S. Ct. 595 (1991) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The defendant contends that he is entitled to an acquittal because there was evidence that Mrs. Ricupero knew her telephones were being recorded. Section 2511(2)(d) provides that it is no crime under the Act for one to record a conversation if one of the parties thereto consents. And thus, the defendant claims that his conduct could not be criminal if the recordings were lawful. The trial court instructed the jury that since Wuliger raised the issue of "consent," the government "must prove beyond a reasonable doubt that Polly Ricupero did not give her prior consent to the interception of her telephone calls." There is ample evidence in the record indicating that in mid-March 1989 Mrs. Ricupero was unaware that her telephone calls were being recorded. The record indicates

that although she may have suspected her husband was tapping the home phones, her suspicion did not arise until after most of the conversations were recorded. More importantly, she testified she did not actually know of the wiretap until the April 10th hearing at which the defendant first used the recordings.

V.

Under section 2511(1)(d), the government must prove beyond a reasonable doubt that the defendant knew or had reason to know that the recordings he used were obtained in violation of the Act. The District Court's failure to instruct the jury properly on the requisite mental element of section 2511(1)(d) amounted to plain error. Accordingly, we REVERSE the defendant's conviction and REMAND the case for a new trial consistent with this opinion.

WELLFORD, Senior Circuit Judge, concurring. I am in full agreement with all but part II.A. of Judge Kennedy's decision in this interesting case. I join in the result reached, but write separately because I wish to emphasize that the issue of plain error in the district court's instruction to the jury on "knowledge or reason to know of the violation" under 18 U.S.C. § 2511(1)(d) is a very close question. (Part II.A. of the majority opinion.)

The district judge instructed the jury on this issue, using first the language of the statute which makes it plain that the offender must be shown to have made intentional use of the described communication (in this case, telephone communication) "knowing or having reason to know" that the intercepted information was "in violation of" the law. The jury was thus given necessary information that the wire interception use statute required: (1) an intentional use or attempted use; (2) knowledge or reason to know that the information in question was obtained through intentional interception; and (3) that the interception itself was in violation of the act.

Only the latter requirement was not adequately explained by the district court in one part of its instruction, but in quoting the language of the statute, that necessary element was included. The indictment counts on which defendant was found guilty also tracked this statutory language in that Wuliger did

> *intentionally use* and endeavor to use, *the contents of a wire communication*, a telephone conversation of Polly Ricupero, *knowing and having reason to know that the information was obtained through the interception of a wire communication in violation of Title 18, United States Code, Section 2511(1)(a);* that is, the information was *obtained through the intentional interception* of a wire communication.

(emphasis added). The indictment counts, with all the necessary statutory requirements, were also read to the

jury. The district court adequately advised the jury that the government had to prove all the necessary elements charged in the indictment beyond a reasonable doubt.

The elements as set out by the district court omitted the requirement that dealt with knowledge or reason to know about the interception's being in violation of law; that is, without the consent or approval of the telephone user, Polly Ricupero. (Wilhelm) (18 U.S.C. § 2511(1)(d)). "Even if an instruction proves impermissible viewed in isolation, the reviewing court upholds the instruction if it takes on a permissible meaning in the context of surrounding instructions." *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991) (citing *California v. Brown*, 479 U.S. 538, 541 (1987) (holding that it is what a reasonable juror could have understood that is important)).

What makes this case even more difficult is the very nature of the intercepted information itself, including conversations between Mrs. Ricupero and her lawyer, and between her and her lover. It would seem evident to a reasonable person that there was no consensual interception of such conversations.[1] David Ricupero, Wuliger's client, admitted that he "thought" he told Wuliger's law office associate or assistant, Doug Leak, that his wife "was not aware that she was being recorded" after delivering the tapes to Wuliger's office.

At trial, moreover, Wuliger's counsel took the position at a bench conference that "the tape was made illegally." Leak said that he relayed to Wuliger "David's concerns about using the tapes," and his own "question of whether it was legal to use the tapes." In sum, his "impression was that Polly didn't know that she was being recorded" based on the tapes and the transcripts thereof which were furnished to Wuliger.[2]

---

[1] Wuliger's law office assistants had this impression.

[2] Wuliger later disposed of the transcripts.

Only by giving defendant the benefit of considerable doubt can I concur with the decision that the instructions, taken as a whole, were fatally defective and deprived defendant of a fair trial.

Case No. 92-3061

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, vs. WILLIAM T. WULIGER Defendant-Appellant.	:	ORDER

BEFORE: KENNEDY AND MILBURN, Circuit Judges; and WELLFORD, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellee,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

WELLFORD, Senior Circuit Judge, concurring:

As indicated in my initial separate opinion, I find this to be a very close case. United States v. Chan Chun-Yin, 958 F.2d 440 (D.C. Cir.), cert. denied, 112 S. Ct. 3010 (1992), is a basis for finding that the omission in the jury instruction may be harmless error. I find an insufficient basis to dissent from denial of a rehearing, but the court may deem it a proper candidate for

rehearing en banc, because this controversy involves a statute and an

interesting issue not previously considered by the Sixth Circuit.

This Court "should not exercise [its] discretion [to correct the forfeited error] unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United States v. Young, 470 U.S. 1, 15 (1985)(quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))." United States v. Olano & Gray, __U.S.__. 61 U.S.I.W. 4421, 4423 (April 26, 1993(emphasis added). I am not sure that the error in jury instruction did seriously or necessarily affect the fairness and integrity of the proceedings against Wuliger, an experienced trial counsel.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

UNITED STATES OF AMERICA — Judgment In A Criminal Case

v. — For Offenses Committed On or After November 1, 1987)

WILLIAM T. WULIGER — Case Number:1:91CR0104-001

(Name of Defendant) — Jack G. Day
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)_____

☒ was found guilty on count(s) 4, 6, 8 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve

the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 2511(1)(d)	Intentional Use of Illegally	5/24/89	4
	Intercepted Wire communications,	5/26/89	6
	A Class D Felony	7/8/89	8

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒The defendant has been found not guilty on count(s) 1, 2, 3, 5, 7, and is discharged as to such count(s).

☐Count(s)___(is)(are) dismissed on the motion of the United States.

☒It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 4, 6, 8 ($150.00), which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 274-40-1705

Defendant's Date of Birth: 2/15/44

Defendant's Mailing Address:

35939 Solon Road
Bentleyville, Ohio

Defendant's Residence Address:

Same as above

January 9, 1992
Date of Imposition of Sentence

Signature of Judicial Officer

George W. White,
U.S. District Judge
Name & Title of Judge

Date

PROBATION

The defendant is hereby placed on probation for a term of two (2) years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:
During the first thirty days of probation the defendant shall remain at his place of residence unless given written permission in advance by the U.S. probation Office to be elsewhere (work/medical release privileged granted).
The defendant will immediately surrender his license to practice law.

THE ABOVE SENTENCE IS STAYED PENDING A RULING BY THE U.S. COURT OF APPEALS.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The Defendant shall pay a fine of $ 5,000.00 . The find includes any costs of incarceration and/or supervision.

☐ This amount is the total of the fines imposed on individual counts, as follows:

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived

☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

☐ in fully immediately

☐ in full not later than_____.

☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequently payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Judgment-Page 8 of 9

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): The court did not add two points for adjustment to obstruction of justice.

Guideline Range Determined by the Court:

Total Offense Level: 7

Criminal History Category: I

Imprisonment Range: 1 to 7 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 1,000 to $ 10,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant;s substantial assistance.

☐ for the following reason(s):

18 U.S.C. § 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who -

* * *

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(2)(d)

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the Unites States or of any State.

18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2518(10)(a)

(10)(a) Any aggrieved person in any trial, hearing, or proceedings in or before any court, department, officer, agency, regulatory bid, or other authority of the United States, a State, or political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

18 U.S.C. § 2520(d)

(d) **Defense.** - A good faith reliance on -

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination of that section 2511(8) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

LAWYER IS CONVICTED OF EMPLOYING EVIDENCE WIRETAPPED BY HIS CLIENT

By Milo Geyelin and Christi Harlan - Staff Reporters of the Wall Street Journal

A federal jury in Cleveland convicted a lawyer of using wiretapped phone conversations gathered illegally by his client in a divorce case, believed to be the first such prosecution of a lawyer under federal wiretap statute in the country.

The case highlights a problem long recognized by divorce lawyers, the illegal gathering of information against husbands and wives by their estranged spouses. It also highlights a question over which courts remain deeply split: does the Federal Wiretap Act of 1968 bar family members from tape recording each other's conversations?

The legislative intent of the federal law, as applied to families, has always been unclear. Last January it became an issue in a sensational murder trial in California. That case involved a woman accused of murder who allegedly plotted her husband's death over the phone, only to find herself incriminated because her husband had installed a voice activated tape recorder.

A California state appeals court ruled that the tapes could be used against her at a trial: "Interspousal eavesdropping and phone tapping in the family home, over family phones," the court ruled, are not prohibited by the federal wiretap act. That case has since been appealed to the California Supreme Court.

The Cleveland case raised the same issue, though not as dramatically. Cleveland attorney William T. Wuliger accepted several tape recordings from his client of conversations on his home phone. The conversations included some between the client's wife and her boyfriend. Mr. Wuliger had nothing to do with the taping but reasoned that his client's wife gave implicit consent to being recorded because in one conversation she openly voiced her suspicion that the line was tapped.

Mr. Wuliger subsequently used transcripts from the conversations in two hearings and two depositions. Federal prosecutors decided to pursue him because the Justice Department's "priority is to go after the professionals involved," said a prosecutor involved in the case. Mr. Wuliger's client received immunity and was not prosecuted because his testimony was needed to convict Mr. Wuliger.

A prosecutor said that nearly 80% of illegal electronic surveillance, including wiretapping, occurs in divorce cases. Bringing criminal charges in this instance was seen as an opportunity to deter continued abuses, the prosecutor said.

Lawyers who specialize in family law said yesterday that clients in contested or bitter divorce cases frequently wiretap their home phones to gather incriminating evidence. To the fighting parties, said Gary Skoloff, past chairman of the American Bar Association's family law section, wiretapping is not much different than opening a spouse's mail.

"Unfortunately, wiretapping is more widespread than most people realize," said Mr. Skoloff, adding that most divorce lawyers shun it because of criminal implications.

John Garver, Mr. Wuliger's attorney in Cleveland, said he plans to appeal the verdict.

(2)

No. 93-946

Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM T. WULIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

4pp

In the Supreme Court of the United States

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WILLIAM T. WULIGER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges a decision of the court of appeals reversing his convictions and remanding the case for a new trial.

1. An indictment was returned in the United States District Court for the Northern District of Ohio charging petitioner, an attorney, with, among other things, multiple violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510-2520. The charges were based on petitioner's use in a domestic-relations case of tape recordings that his client had made of telephone conversations between the client's wife and other people. After a jury trial, petitioner was convicted on three counts of violating 18 U.S.C. 2511(1)(d)

by intentionally using the contents of telephone conversations intercepted in violation of Title III. The district court sentenced petitioner to 30 days' home confinement, imposed a term of two years' probation conditioned upon his surrender of his license to practice law, and fined him $5000. Pet. App. A30-A38.

The court of appeals reversed the convictions and remanded for a new trial. Pet. App. A1-A27. It held that the district court committed plain error by failing to instruct the jury that, in order to establish a violation of Section 2511(1)(d), the government was required to prove beyond a reasonable doubt that petitioner knew or had reason to know that his client recorded his wife's telephone conversations without her consent. Pet. App. A5-A10.

2. Petitioner contends (Pet. 4) that "no remand should be necessary because he should have been acquitted of the charged offenses." In support of that contention, he argues (Pet. 18-31) that Section 2511(1)(d) should be construed to exempt from criminal liability lawyers who violate Title III in good faith. He also argues (Pet. 31-51) that the Sixth Circuit's interpretation of Section 2511(1)(d) conflicts with decisions of other circuits and (Pet. 52-62) that, as construed by the Sixth Circuit, Section 2511(1)(d) violates the Due Process Clause and the Tenth Amendment.

Whatever the merits of petitioner's arguments, they are not ripe for review by this Court. The court of appeals reversed petitioner's convictions and remanded for a new trial on the charges on which he was convicted. If petitioner is acquitted on those charges, the arguments advanced in his petition will

be moot. If, on the other hand, he is convicted on the charges and his conviction is affirmed on appeal, he will then be able to present his arguments to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

NO. 93-946

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM T. WULIGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF POSITION OF PETITIONER WILLIAM T. WULIGER

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Attorney for Amicus Curiae
Ohio Association of Criminal
Defense Lawyers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

Introduction 1

Statement of the Case and the Facts 4

Reasons For Granting Petitioner's Writ 4

I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY CONSIDER WHETHER THE PRESENTATION BY AN ATTORNEY OF EVIDENCE DEFINED BY THE WIRETAP ACT AS ADMISSIBLE CAN CONSTITUTE CRIMINAL CONDUCT 4

II. THE SIXTH CIRCUIT'S OPINION, HOLDING THAT AN ATTORNEY MAY BE SUBJECT TO CRIMINAL SANCTIONS FOR PRESENTING ADMISSIBLE EVIDENCE OR EVEN ARGUABLY ADMISSIBLE EVIDENCE, CONTRAVENES FUNDAMENTAL CONSTITUTIONAL PROVISIONS RELATING TO THE ATTORNEY'S PRIVILEGES AND IMMUNITIES, THE CLIENT'S RIGHT TO DUE PROCESS OF LAW AND THE COURT SYSTEM'S AUTHORITY TO REGULATE ITS AFFAIRS 11

III. THE SIXTH CIRCUIT'S DECISION FURTHER DIVIDES THE FEDERAL JUDICIARY AS TO THE MEANING AND SCOPE OF THE WIRETAP ACT AND RETROACTIVELY ESTABLISHES ARBITRARY DISTINCTIONS BETWEEN CLASSES OF PEOPLE WHO MAY OR MAY NOT BE PROSECUTED FOR VIOLATIONS OF 18 U.S.C. § 2511 23

Conclusion 31

TABLE OF AUTHORITIES

Cases

Page

Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E. 2d 910 (C.P. Stark County, 1974) 13, 14

Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86) 14

Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78) 14

Fultz v. Gilliam, 942 F.2d 396 (6th Cir., 1991) 13

Gelbrand v. United States, 408 U.S. 41 (1972) 6

Heggy v. Heggy, 944 F.2d 1537 (10th Cir., 1991), cert denied 112 S. Ct. 1514 (1992) 23

In re Grand Jury Proceedings, 613 F.2d 1171 (D.C. Cir., 1979) 6

In re Harkins, 624 F.2d 1160 (3rd Cir., 1980) 6

Jacks v. Duckworth, 484 F. Supp. 1366 (D. Ind., 1980), aff'd 651 F.2d 480 (7th Cir., 1981) 24

Lam Lek Chong v. U.S. Drug Enforcement Admin., 929 F.2d 729 (D.C. Cir., 1991) 5

McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183 (D. Conn., 1984 8

Page

Newcomb v. Ingle. 944 F.2d 1534 (10th Cir., 1991), cert. denied 112 S. Ct. 903 (1992) 23

Phillips v. Warden, State Prison, 220 Conn. 112, 595 A.2d 1356 (1991) 18

Rice v. Rice, 951 F.2d 942 (8th Cir., 1991) 20

Simpson v. Simpson, 490 F.2d 803 (5th Cir., 1974) . 13

United States v. Bragan, 499 F.2d 1376 (4th Cir., 1974) 5, 12

United States v. Caron, 474 F.2d 506 (5th Cir., 1973) 12, 24

United States v. Clemente, 482 F. 482 F. Supp. 102 (D.N.Y., 1979), aff'd 663 F.2d 207 5

United States v. DeFalco, 644 F.2d 132 (3rd Cir., 1979) 18

United States v. Eschavaria - Olarte, 904 F.2d 1391 (9th Cir., 1990) 12, 24

United States v. Johnson, 539 F.2d 181 (D.C. Cir., 1976), cert. denied 429 U.S. 1061) 10, 24

United States v. Jones, 542 F.2d 661 (6th Cir., 1976) 13

United States v. Liddy, 354, F.Supp. 217 (D.C., 1973) 8

Page

United States v. McLain, 823 F.2d 1457 (11th Cir., 1987) 18

United States v. Scavo, 593 F.2d 837 (8th Cir., 1979) 10, 12, 24

United States v. Sisca, 503 F.2d 1337 (2nd Cir., 1974), cert. denied 420 U.S. 1005 . . . . . 10, 24

United States v. Vest, 813 F.2d 477 (1st Cir., 1987) 24

Walder v. United States, 347 U.S. 62 (1954) 29

Statutes

18 U.S.C. § 2511 . . . . . 7, 27, 31

18 U.S.C. § 2515 . . . . . 8, 29

18 U.S.C. § 2518 (10)(a) 6, 29

18 U.S.C. § 2520 7

Ohio R. Civ. P. 26(C) 30

Ohio R. Civ. P. 30(D) 30

Miscellaneous

Code of Professional Responsibility 11

Introduction

Title III of the Omnibus Crime Control And Safe Streets Act of 1968 (hereinafter referred to as "the Act") has been the basis for prosecutions against persons who have unlawfully intercepted, used or disclosed the wire communications of others. The majority of these cases have been prosecutions against an individual solely because he or she allegedly engaged in an unlawful interception. A few cases have been prosecutions against a defendant for both wiretapping and using or disclosing the contents of the intercepted wire communication. Until the prosecution of William T. Wuliger in the case sub judice, no attorney had ever been prosecuted solely for using information from a wire interception as evidence on the record during the course of formal judicial proceedings.

Upon review of this case, the United States Court of Appeals for the Sixth Circuit has acknowledged that it was confronted with a number of novel and

significant issues. However, its decision created more problems than it resolved, and fostered implications so vast as to threaten the very foundations of the adversary system. For instance, the Sixth Circuit has construed this Act to mean that it is criminal to use the contents of a wire interception even if the victim of the interception expressly consents to that use.

Similarly, the Sixth Circuit has indicated that, even in the face of a waiver which would render admissible the evidence from an interception, any subsequent use by an attorney in an attempt to present such evidence is criminal.

Furthermore, the Sixth Circuit has held that, with the possible exception of prosecuting attorneys, it constitutes criminal misconduct for a lawyer to use the contents of the a wire interception solely for the purpose of impeaching the subject of a wire interception during judicial proceedings.

Finally, and, in certain respects, most

significantly, the Sixth Circuit has construed the good faith provisions of the Act in such a way as to force attorneys to ignore both legal precedent and their ethical duty to zealously represent their clients, for fear of criminal prosecution.

In so doing, the Sixth Circuit has construed the Act in such a manner as to create absurd and devastating results. It has invaded the province of the state courts, impaired the independence of the judiciary and wreaked havoc upon the adversary system. It has also arbitrarily created one set of rules for federal prosecutors and a different, far more intrusive and stringent set of rules, destructive of the independence of the remainder of the bar.

For the reasons that follow, the Ohio Association of Criminal Defense Lawyers (hereinafter "Amicus"), respectfully submits that the instant case presents issues of such magnitude as to warrant this Court's attention.

Statement of the Case and the Facts

Amicus hereby incorporates by reference the Statement of the Case And the Facts Set Forth in petitioner William T. Wuliger's Petition For A Writ of Certiorari, the same as if fully rewritten herein.

Reasons For Granting Petitioner's Writ

I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY CONSIDER WHETHER THE PRESENTATION BY AN ATTORNEY OF EVIDENCE DEFINED BY THE WIRETAP ACT AS ADMISSIBLE CAN CONSTITUTE CRIMINAL CONDUCT.

The Sixth Circuit's decision in the case at bar holds that an attorney, or at least those attorneys who are not federal prosecutors, may be prosecuted and convicted solely for using the contents of an unlawful wire interception as evidence during formal legal proceedings: (1) Even though the subject of the wire interception has expressly consented to such use; (2) Even though such evidence would correctly be deemed admissible under the provisions of the Act; and (3) Even

though the attorney's use of such evidence was in conformity with legal precedent of the court system in which such use of evidence occurred.

If the "use" provisions of the Act were designed to protect an individual's interest in maintaining the privacy of his wire communications, as has been widely recognized,[1] then the further prosecution of petitioner Wuliger can serve no statutory purpose, since Polly Ricupero agreed, by and through her attorney, that Wuliger would be permitted to use her intercepted communications for purposes of his cross-examination of her. At least one court has held that, upon the consent of the subject of an unlawful wiretap, the contents of his intercepted communications become admissible evidence. United States v. Bragan, 499 F.2d 1376 (4th Cir., 1974). It would be absurd and contrary

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[1]See, e.g., Lam Lek Chong v. U.S. Drug Enforcement Admin., 929 F.2d 729 (D.C. Cir., 1991); United States v. Clemente, 482 F. 482 F. Supp. 102 (D.N.Y., 1979), aff'd 663 F.2d 207.

to the purposes of the Act to conclude that evidence may be admissible while, at the same time, to conclude that the attorney who presents the admissible evidence is thereby committing a crime.[2]

For the same reasons, the portion of the Sixth Circuit's opinion dealing with petitioner's waiver argument cannot withstand close scrutiny. Essentially, petitioner has argued that the tape recordings of Polly Ricupero's wire communications were admissible, pursuant to 18 U.S.C. § 2518 (10)(a), because Mrs. Ricupero's failure to file a motion to suppress or for a protective order constituted a waiver regarding admissibility. The Sixth Circuit acknowledged that Polly Ricupero may have waived that issue, but held,

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[2]One of the primary purposes of the suppression provisions of the Act is to ensure that courts do not become partners to illegal conduct. E.g. Gelbrand v. United States, 408 U.S. 41 (1972); In re Harkins, 624 F.2d 1160 (3rd Cir., 1980); In re Grand Jury Proceedings, 613 F.2d 1171 (D.C. Cir., 1979). Thus, such evidence cannot be admissible unless it is lawful for an attorney to proffer such evidence.

nevertheless, that the admissibility or inadmissibility of the tapes was irrelevant to the question of Wuliger's criminal liability.

In other words, an attorney who relies on established law as to waiver and "consent to use" – and, thereby, fulfills his ethical obligation to present admissible evidence favorable to his client – risks criminal sanctions!

The Sixth Circuit was willing to overlook this absurdity on the apparent basis that 18 U.S.C. § 2511 contains no express exception excluding such evidentiary uses from the scope of proscribed conduct. What the Sixth Circuit failed to realize, however, was that there are a variety of implied exceptions to the use provisions of the Act which courts have recognized in order to effectuate the purposes of the Act and to avoid absurd consequences.[3]

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[3]For instance, it is beyond dispute that it is lawful for a civil defendant in a § 2520 suit to use the contents

The implications of the Sixth Circuit's opinion are that there exists one body of law which governs the admissibility of evidence derived from wire interceptions and a different and independent body of law applicable to the question of whether an attorney who uses such admissible evidence thereby commits a crime. However, the language of the Act itself militates against such a dichotomy. Section 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if

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of a even an unlawful wire interception for purpose of presenting his defense. (McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183 (D. Conn., 1984)), just as it is lawful for a prosecutor to use such information when presenting his case in chief in a § 2511 prosecution (United States v. Liddy, 354, F.Supp. 217 (D.C., 1973)). Thus, the lack of an express exception to § 2511 liability is hardly dispositive of this issue.

> the disclosure of that information would be in violation of this chapter. (Emphasis added).

Thus, pursuant to the plain meaning of this statutory provision, the act of presenting admissible evidence cannot constitute criminal conduct. In short, because there cannot be two difference standards for judging admissibility and criminality, if an attorney presents admissible evidence, he commits no crime.

It may still be argued that the language of the Act does not contain any provision which indicates that an impeachment use or a party's consent to use renders such evidence admissible. For the reasons set forth above, amicus submits that such an argument is unpersuasive. However, even assuming that such an argument has validity, it is, nevertheless, beyond legitimate dispute that evidence derived from even an unlawful wiretap is admissible following a waiver by the subject of the interception. 18 U.S.C. § 2518(10)(a) provides a mechanism for the suppression of such

evidence by an aggrieved party and further provides that such "...motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." (Emphasis added). If such a motion is not timely asserted, the issue is deemed waived and the tainted evidence is deemed properly admissible. E.g., United States v. Scavo, 593 F.2d 837 (8th Cir., 1979); United States v. Johnson, 539 F.2d 181 (D.C. Cir., 1976), cert. denied 429 U.S. 1061); United States v. Sisca, 503 F.2d 1337 (2nd Cir., 1974), cert. denied 420 U.S. 1005. However, as expressly noted in § 2515, such evidence can be deemed admissible only if its disclosure does not violate the Act.

In the case sub judice, petitioner Wuliger presented the alleged tainted evidence following a waiver by the subject of the interception. Accordingly, the evidence was admissible and his use thereof lawful.

II. THE SIXTH CIRCUIT'S OPINION, HOLDING THAT AN ATTORNEY MAY BE SUBJECT TO CRIMINAL SANCTIONS FOR PRESENTING ADMISSIBLE EVIDENCE OR EVEN ARGUABLY ADMISSIBLE EVIDENCE, CONTRAVENES FUNDAMENTAL CONSTITUTIONAL PROVISIONS RELATING TO THE ATTORNEY'S PRIVILEGES AND IMMUNITIES, THE CLIENT'S RIGHT TO DUE PROCESS OF LAW AND THE COURT SYSTEM'S AUTHORITY TO REGULATE ITS AFFAIRS.

This Court has, on occasion, taken note of the importance of zealous advocacy in our judicial system. In both Maness v. Meyers, 419 U.S. 449 (1975) and In re Watts, 190 U.S. 1 (1903), this Court has taken the position that the role of an attorney is so important to the administration of justice and to a client's right to due process of law that he should not be subject to punishment for the good faith performance of his duties.

As discussed more fully in petitioner Wuliger's petition, the Code of Professional Responsibility sets forth a variety of professional duties which a litigator must strive to fulfill. Pursuant to those duties, it is

incumbent upon a trial attorney to explore, use and present evidence which may be favorable to his client, provided that there exists at least a good faith argument in support of the admissibility thereof.

Let us assume for the sake of argument that Wuliger knew that Polly Ricupero's wire communications were intercepted without her knowledge or consent. It is, nevertheless, the position of amicus that Wuliger's professional obligations would have required him to present such evidence because there existed a body of law holding that even unlawfully acquired information may be used for impeachment purposes[4] or following the consent[5] or waiver[6] of the intercepted party. Moreover, there also

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[4]E.g., United States v. Eschavaria - Olarte, 904 F.2d 1391 (9th Cir., 1990); United States v. Caron, 474 F.2d 506 (5th Cir., 1973).

[5]E.g., United States v. Bragan, supra

[6]E.g., United States v. Scavo, supra.

existed substantial precedent for the proposition that, with or without consent to a wiretap, a person may lawfully intercept the wire communications of his or her spouse within the marital residence while the parties are still residing as husband and wife.[7] Moreover, it must be noted that, at the time that Wuliger used these tapes, the Sixth Circuit had not yet ruled on any of those issues.[8] Domestic relations courts within Wuliger's

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[7]E.g., Simpson v. Simpson, 490 F.2d 803 (5th Cir., 1974); Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E. 2d 910 (C.P. Stark County, 1974).

[8]In United States v. Jones, 542 F.2d 661 (6th Cir., 1976), the Sixth Circuit had refused to recognize a spousal exception, but the facts of Jones did not involve spouses still living together within the marital residence. Although the Jones court strongly indicated that it would not deem that additional fact to be dispositive, such a suggestion, however strongly made, remains dicta. Thus, it was still arguable even in the Sixth Circuit in 1989 that interspousal taps are not criminal if made in the marital home during cohabitation, as had been recognized in Simpson v. Simpson, supra, and other cases. It should also be noted that the Sixth Circuit's opinion in Fultz v. Gilliam, 942 F.2d 396 (6th Cir., 1991) -- upon which the Sixth Circuit relied in the case at bar - was not decided until two years after the alleged conduct referenced in the indictment herein.

state, on the other hand, had ruled such evidence admissible on a variety of grounds and had, in fact, specifically recognized the impeachment and spousal exceptions to the Act.[9]

Whether or not those various grounds for admissibility are ultimately recognized by the Sixth Circuit or by this Court is irrelevant to the issue of Wuliger's guilt or innocence. Amicus is not contending here that "mistake of law" necessarily and under all circumstances absolves a defendant of culpability for his criminal misconduct. Rather, it is the contention of amicus that, whether an attorney is correct or incorrect in his assessment of how a given court will view his position as to the bases for the admissibility of wiretap-related evidence, it is essential to the adversary system

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[9]E.g., Beaber v. Beaber, supra; see also, Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86); Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78).

that he be granted sufficient latitude to represent his client based on any position which is reasonably arguable in good faith. Amicus respectfully submits that, without such latitude, it is impossible for a litigator to function in a meaningfully adversarial role within the judicial system.

The inevitable result of the Sixth Circuit's decision in this case, if permitted to stand, will be a chilling effect on the bar in general and an institutionalized conflict of interest between attorneys and the clients they represent. In sum, the client's right to the effective and zealous assistance of counsel will be undermined.

It is hardly unlikely that two classes of private-sector attorneys would develop as a result of the approach developed by the Sixth Circuit: (1) Those who simply will not risk the potential consequences of ever using even clearly lawfully taped evidence, regardless of the strength of the legal position favoring such use;

and (2) Those who will utilize such evidence in a covert manner so that the existence of any such recordings cannot be discovered. In the former case, the client's right to zealous legal representation will be emasculated; in the latter instance, the trial court -- which should be the ultimate arbiter of admissibility questions -- will never be presented with the opportunity to distinguish between lawfully and unlawfully acquired tapes or between admissible or inadmissible evidence. Nor will the trial court be in a position to determine whether counsel is using derivative evidence, which would be excludable as "fruit of the poisonous tree".

In the case sub judice, petitioner Wuliger was openly attempting to explore and present evidence on the record for an ultimate ruling by the trial court as to its admissibility. In so doing, he was relying on the representations of his client, precedent existing within Ohio's judicial system and case law from various federal

jurisdictions, as a dedicated trial attorney is ethically required to do.

Amicus respectfully submits that any construction of the Act which nullifies a lawyer's ethical duties and results in such a chilling effect on the fulfillment of his professional role would violate not only the client's rights to due process of law and adequate legal representation, but also the attorney's right to free speech and the liberty interests, privileges and immunities relating to the practice of his profession.

Beyond the damage to these individual rights, however, is the systemic harm which will inevitably result from such a construction of the Act. In every case involving the tape recorded conversations of third parties, the lawyer will be confronted with an unavoidable conflict of interest, if the Sixth Circuit's decision is permitted to stand. Due to the ever-present risk that he will be subject to criminal prosecution for an evidentiary use of taped materials, a lawyer's

independent judgment and undivided loyalty to his client will, of necessity, be subject to improper influence. It has consistently been held that a client is denied the effective assistance of counsel when such a conflict affects the zealousness of his attorney's representation of him. E.g., United States v. McLain, 823 F.2d 1457 (11th Cir., 1987); United States v. DeFalco, 644 F.2d 132 (3rd Cir., 1979); Phillips v. Warden, State Prison, 220 Conn. 112, 595 A.2d 1356 (1991). Pursuant to the Sixth Circuit's opinion, an attorney has a Hobson's choice of three alternatives when a client presents him with tape recordings of a third party's conversations: (1) To refuse or withdraw from representation; (2) To continue representing the client, but refuse to use the recordings, even if they are arguably lawfully obtained and/or admissible; or (3) To use the tape recordings despite the risk of his own loss of liberty attendant to a § 2511 prosecution.

If an attorney is to function as a zealous legal

representative within the adversary system, he must be free of such inherent conflicts of interest. He must be free to present his client's case in any manner which serve the client's interests, so long as his position is based upon existing precedent or upon reasonable arguments which can, in good faith, be advanced for the modification, extension or reversal of existing law. Without that freedom, he cannot practice his profession within the framework of the adversary system as it has existed since the inception of this country. The Sixth Circuit's opinion renders that zone of freedom illusory.

In addition to the devastating effect which the Sixth Circuit's opinion has upon a lawyer's role within the adversary system, it also insidiously invades the province of the state judiciary. According to the Sixth Circuit, an attorney may not rely on legal precedent issued by courts within his state as to the admissibility of tape recorded evidence. Indeed, petitioner Wuliger relied on Beaber v. Beaber, supra, which held that

evidence from a non-consensual wire interception was admissible for impeachment purposes and pursuant to what the court deemed to be the spousal exception to the Wiretap Act. The Sixth Circuit held that, notwithstanding such reliance, Wuliger will be subject to a second trial on those charges. Amicus respectfully submits that, if an attorney's reliance on state court precedent as to admissibility does not shield him from prosecution for his use of taped evidence, then that precedent is, as a practical matter, meaningless.[10] As a practical matter, admissibility of intercepted evidence will be determined not by the trial courts, but largely by the Department of Justice, which will selectively prosecute individuals such as Wuliger based on its view of whether the corresponding federal courts seem

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[10]Although the Sixth Circuit ruled that Wuliger would be subject to a second trial notwithstanding his reliance on precedent, at least one other federal circuit court has taken a contrary view, holding that such reliance obviates culpability. Rice v. Rice, 951 F.2d 942 (8th Cir., 1991).

receptive to such prosecutions. Quite simply, the state courts will be taken "out of the loop", if attorneys who practice in those courts may not rely on their precedent.

The Sixth Circuit's decision also has the practical effect of interfering with or supplanting the state court system's traditional disciplinary power, placing it instead in the hands of the Justice Department. In the normal course of a state court proceeding involving the use or attempted use of recordings derived from a wire intercept, the trial court would consider the circumstances and make rulings as to the legality and admissibility of such evidence. In such cases, an attorney who made an adversarial use of such materials in good faith reliance on precedent of the state's court system would be unlikely to incur any disciplinary sanction, and certainly should not be subject to prosecution. However, pursuant to the implications of the Sixth Circuit's opinion, that same attorney would face federal prosecution. Thus, the state's mechanism

for dealing internally with the alleged misconduct of members of its bar -- which has always functioned admirably in policing unethical conduct -- would be rendered superfluous. The ultimate power to target attorneys for punitive action would reside with the Justice Department, whose standard would not be based on whether the attorney was acting ethically and in good faith, but solely upon whether he presented allegedly tainted evidence.

Amicus respectfully submits that the Sixth Circuit's opinion has created an interpretation of the Act which is so intrusive upon, and inimical to, the adversary system, the independence of the judiciary and the traditional powers of the several states that it should not be permitted to remain standing. Accordingly, amicus submits that Wuliger's petition for a writ of certiorari warrants this Court's attention.

III. THE SIXTH CIRCUIT'S DECISION FURTHER DIVIDES THE FEDERAL JUDICIARY AS TO THE MEANING AND SCOPE OF THE WIRETAP ACT AND RETROACTIVELY ESTABLISHES ARBITRARY DISTINCTIONS BETWEEN CLASSES OF PEOPLE WHO MAY OR MAY NOT BE PROSECUTED FOR VIOLATIONS OF 18 U.S.C. § 2511.

For a number of years, and even before the Sixth Circuit issued its decision herein, the various federal circuit courts of appeals have been in conflict as to the meaning and scope of the Act, at least as it relates to the legality of interfamilial wiretaps.[11] The decision of the Sixth Circuit in the case at bar serves only to create further division of opinion. For instance, the Sixth

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[11]As noted in Wuliger's petition, at pages 44-5, the Second and Fifth Circuits recognized an interspousal exception in 1989, whereas the Fourth and Eighth Circuits did not. Since that time, federal courts have continued to struggle with the question of the legality of interceptions within a family unit, as reflected in the 10th Circuit's conclusion that an interspousal wiretap is unlawful, whereas the interception one's child communication is lawful. See Newcomb v. Ingle, 944 F.2d 1534 (10th Cir., 1991), cert. denied 112 S. Ct. 903 (1992), and Heggy v. Heggy, 944 F.2d 1537 (10th Cir., 1991), cert denied 112 S. Ct. 1514 (1992).

Circuit's rejection of petitioner Wuliger's "consent-to-use" defense is in direct conflict with the law of the Fourth Circuit as set forth in United States v. Bragan, supra. Similarly, the Sixth Circuit's rejection of Wuliger's waiver argument is in conflict with the opinion of the Second, Eighth and District of Columbia Circuits, as expressed in United States v. Sisca, supra; United States v. Scavo, supra; and United States v. Johnson, supra. In addition, the Sixth Circuit's rejection of Wuliger's argument that the contents of a wire interception may be used for impeachment purposes creates a conflict with the First, Fifth, Seventh and Ninth Circuits, as set forth in United States v. Vest, 813 F.2d 477 (1st Cir., 1987); United States v. Caron, supra; Jacks v. Duckworth, 484 F. Supp. 1366 (D. Ind., 1980), aff'd 651 F.2d 480 (7th Cir., 1981); and United States v. Eschavaria - Olarte, supra.

Thus, following the Sixth Circuit's decision herein, the various circuits are more "Balkanized" than

they have ever been with respect to the meaning and scope of the Act. The resulting and continuing uncertainty as to nature and scope of proscribed conduct under the Act is of deep concern to the private bar.

This is particularly so where lawyers such as Wuliger can be prosecuted according to the geographical location where his conduct occurs. As noted in Wuliger's petition, based upon precedent in various federal jurisdictions, Wuliger could not have been prosecuted in the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh or District of Columbia Circuits -- an area comprising 36 states, one unincorporated territory, one trust territory and the District of Columbia! Amicus submits that the determinative test of criminal culpability under the Wiretap Act should not be the geographical location of the defendant.

It is also troubling to the bar that, in addition to

discounting petitioner Wuliger's reliance on existing state and federal precedent, the Sixth Circuit's opinion provides that Wuliger will be subject to a second trial based on Sixth Circuit rulings which were not rendered until well after the conduct alleged by the government in its indictment against Wuliger.

For instance, as noted above, the Sixth Circuit did not hold, until 1991, that all non-consensual interspousal interceptions are unlawful, regardless of whether the spouses were residing together as husband and wife at the time of the interception. The Sixth Circuit's rulings in this case as to the issues of impeachment use, waiver and consent-to-use created new law, never before reached or even foreshadowed by the court and contrary to that of other jurisdictions. The retroactive application of those novel propositions to petitioner Wuliger is deeply disturbing to members of the bar, who are properly accustomed to practicing their profession and making evidence-related decisions based

on existing precedent, rather than upon the fear of what new approach another court may take at some later date.

What is most disturbing to this amicus and its membership, however, is that the Sixth Circuit creates two classes of attorneys based solely upon whether their client happens to be a private individual or the government. According to the implications of the Sixth Circuit's opinion, a prosecutor who uses unlawful recordings following a criminal defendant's waiver or for purposes of impeaching a criminal defendant might not be subject to prosecution for violation of § 2511, whereas a private attorney who engages in precisely the same conduct must stand trial.

Thus, for example, in a criminal proceeding, a prosecutor may use an unlawfully acquired recording to impeach the criminal defendant, but the defense attorney may not use an unlawfully acquired recording to impeach a key government witness.

Similarly, pursuant to the Sixth Circuit's reasoning, a prosecutor may use such tainted evidence for impeachment purposes, but a civil attorney in a domestic relations case may not use such evidence to impeach the opposing party. The Sixth Circuit's attempted justification of this artificial classification of attorneys was that: (1) The truth finding function of the courts is more important in criminal cases than in civil cases; and (2) Criminal proceedings are always conducted before a judge or magistrate, thus providing immediate judicial intervention when necessary, whereas civil discovery proceedings are not similarly safeguarded.

Amicus submits that the Sixth Circuit is incorrect on both counts. As to the truth-finding function of the courts, amicus disputes that the discovery of the truth in a criminal case is, per se, more important than it is in, for instance, a domestic relations case where the custody and welfare of minor children may be decided.

Moreover, as noted in Wuliger's petition, the impeachment exception to the Fourth Amendment exclusionary rule was not designed to aid in the determination of absolute truth, but to prevent a party from perpetrating a fraud upon the court via false or misleading testimony. Walder v. United States, 347 U.S. 62 (1954). Amicus submits that the integrity of the courts is equally important in every case, regardless of whether it is civil or criminal in nature.

As to the presence of judicial oversight of the use of intercepted information, the Sixth Circuit ignores the fact that both the Act and state law provide substantial safeguards relative to any improper use of evidence during pre-trial discovery. Sections 2515 and 2518 (10)(a) provide for the exclusion or suppression of any such evidence. Moreover, under Ohio law, a party who suspects that unlawful evidence will be utilized during a deposition, or who witnesses the use of such evidence during a deposition, may refuse to appear at deposition,

or adjourn the deposition if it has already commenced, and immediately seek judicial intervention via a motion for a protective order pursuant to Ohio R. Civ. P. 26(C) and 30(D). Thus, there exist adequate safeguards in civil actions to negate the Sixth Circuit's concerns of abuse due to a purported lack of judicial oversight. It is quite simply not necessary to adopt the Sixth Circuit's flawed holding in order to police improper conduct. A system already exists to provide for immediate judicial oversight and not even the government has contended that this system is not functioning well in that regard.

Finally, it appears that the distinction drawn by the Sixth Circuit between prosecutors and private attorneys is part of an unfortunate trend in which the Justice Department is seeking to remove its attorneys from the disciplinary supervision of the state courts. If the Sixth Circuit's opinion is permitted to stand, federal prosecutors will also apparently be free from the supervision of the Sixth Circuit as well, at least as it

relates to the enforcement of §§ 2511, et seq. At the same time, the Justice Department's control over the private bar will be vastly increased, thereby further eroding the authority of the judiciary to control its own evidentiary and disciplinary affairs.

Accordingly, amicus respectfully submits that this case warrants this Court's attention.

Conclusion

The decision of the Sixth Circuit, the review of which is sought herein, presents unfortunate and frightening implications of vast and pervasive dimension. It portends a judicial system in which attorneys can no longer rely upon existing precedent or good faith arguments in deciding what evidence to present in proceedings to which their clients are parties.

It portends a system in which the mere existence of tape recorded evidence of any sort -- lawful or unlawful, admissible or inadmissible -- will necessarily create such a conflict between the interests of the

attorney and those of his client that an attorney's only recourse will be to withdraw as counsel from the particular case.

It further portends that the government will have free reign to target attorneys for prosecution, not based upon the nature of the attorney's conduct, but upon the geographical location of his practice.

Finally, it portends a future in which federal prosecutors are insulated from criminal accountability under the Wiretap Act even when they engage in precisely the same conduct which would lead to the prosecution of a non-governmental attorney.

Amicus respectfully submits that the Sixth Circuit's opinion carries implications so detrimental to and destructive of the adversary system, the independence of the judiciary and the sovereign power of the states that certiorari should be granted herein so that this Court may delineate the scope of the Act and the standards to be applied in future prosecutions under

18 U.S.C. § 2511.

Respectfully submitted,

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NO. 93-946

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM T. WULIGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

TABLE OF AUTHORITIES

Cases

Page

Air Line Pilots Ass'n. International v. UAL Corp., 897 F.2d 1394 (7th Cir., 1990) . 5

Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (C.P. Stark Cty., 1974) 7

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 6

Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86) . 7

Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976) 5

Federal Trade Commisison v. Flotill, Inc., 389 U.S. 179 (1967) 5

Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78) 7

Hawkins v. United States, 358 U.S. 74 (1958) 6

Linkletter v. Walker, 381 U.S. 618 (1965) 6

N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965) 6

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 5

Page

Plumbers, Steamfitters, Refrigeration, Petroleum Fitters And Apprentices of Local 298, A.F. of L. v. Door County, 359 U.S. 354 (1959) ... 6

Richards v. United States, 369 U.S. 1 (1962) 6

United States v. Zacks, 375 U.S. 59 (1963) 6

Waterman S.S. Corp. v. United States, 381 U.S. 252, reh denied 382 U.S. 873 (1965) 5

Statutes

18 U.S.C. § 2510 6

28 U.S.C. § 1254 5

28 U.S.C. § 2101(e) 5

Ohio Supreme Court's Rules For the Government Of The Bar, Rule V (5) 3

Miscellaneous

Supreme Court Rule 18 5

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APPELLANT'S REPLY BRIEF

On or about February 16, 1994, Respondent filed its three-page "Memorandum For The United States In Opposition." In that Memorandum, Respondent does

not contest Petitioner's Statement Of The Case And The Facts. Nor does Respondent contest the fact that this case presents important issues of federal statutory and constitutional law on which state courts and lower federal courts are in substantial and continuing conflict.

Rather, Respondent has limited its response to an argument that the issues presented by Petitioner herein are not ripe for adjudication by this Court.[1]

Petitioner respectfully submits that Respondent's argument lacks cogency in several respects. First, Respondent ignores the fact that Petitioner's appeal to

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[1]Respondent's argument is essentially that Petitioner's conviction was reversed by the Sixth Circuit Court of Appeals which further ordered the case remanded for new trial. Thus, Respondent argues that Petitioner's issues would be mooted by a subsequent acquittal and that, in the event of a subsequent conviction, those issues could be raised via appeal to the Sixth Circuit and certiorari to this Court at that time. However, as discussed below, Petitioner respectfully submits that the issues presented in his Petition are indeed ripe for review and that, even assuming, arguendo, that they were not, ripeness is not the determining factor in this Court's decision to exercise its jurisdiction.

the Sixth Circuit involved a request for an outright acquittal as a matter of law. Insofar as the Sixth Circuit ordered a remand for a new trial, that request for relief was denied. It is, therefore, difficult to comprehend how the Sixth Circuit's judgment as to that issue could possess any more finality following a retrial than it does at this moment.

Second, the government overlooks the immediate and irreparable harm that would inevitably result from a conviction following a retrial, even if that conviction were ultimately reversed upon appeal to this Court. In Ohio, when an attorney is convicted of a felony, he faces an immediate indefinite suspension of his license to practice law, regardless of the fact that an appeal may be pending and regardless of the merits of that appeal.[2] In the case at bar, in fact, following

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[2]Pursuant to Rule V (5) of the Ohio Supreme Court's Rules For the Government Of The Bar, The Ohio Supreme Court may indefinitely and summarily suspend an attorney upon proof of his conviction of a

Petitioner's January 1992 conviction, his Ohio license to practice law was summarily and indefinitely suspended by the Ohio Supreme Court, which was divided on the issue with three of the seven Justices dissenting. As a result, Petitioner was deprived of his right to practice law in Ohio for more than one year until his conviction was reversed on appeal, at which point the Ohio Supreme Court reinstated him. Thus, if Petitioner is retried and convicted based upon what Petitioner contends to be the erroneous principles of law set forth in the Sixth Circuit's opinion, he would be summarily deprived of his license to practice law in Ohio for another two years until a second appeal to the Sixth

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felony. Although couched in discretionary terms, the court's decision to indefinitely suspend an attorney under such circumstances is, as a practical matter, automatic. Following the indefinite suspension order, an attorney will be entitled to reinstatement, under the court's rules, only after his conviction has been reversed on appeal or, in the case of an affirmance of the conviction, only after a formal disciplinary hearing conducted after the appeal has been completed.

Circuit and certiorari to the Court could be completed. Thus, Petitioner may well face irreparable harm if the appeal of this case is deferred until after a retrial.

Third, finality or ripeness is not an essential prerequisite to the exercise of this Court's jurisdiction upon a petition for a writ of certiorari. E.g, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976); Air Line Pilots Ass'n. International v. UAL Corp., 897 F.2d 1394 (7th Cir., 1990); 28 U.S.C. §§ 1254, 2101(e); Supreme Court Rule 18.

Rather, the more pertinent concerns governing this Court's discretionary appellate jurisdiction have traditionally been acknowledged to involve: (1) The need to resolve continuing conflict among lower federal courts in order to facilitate the uniform application of federal law;[3] (2) The need to resolve existing conflicts

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[3]E.g., Federal Trade Commission v. Flotill, Inc., 389 U.S. 179 (1967); Waterman S.S. Corp. v. United States,

between federal and state courts on matters of federal law subject to the concurrent jurisdiction of the two court systems;[4] and (3) The need to resolve troublesome questions regarding the administration of justice.[5]

The case at bar involves each of these concerns. The federal circuit and district courts are in continual conflict as to the meaning and scope of 18 U.S.C. §§ 2510, et seq., particularly with respect to the legality of interfamilial wiretaps. Moreover, the Sixth Circuit's opinion in this case has created additional conflict in holding that the presentation of admissible evidence during judicial proceedings can be deemed to constitute

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381 U.S. 252, reh denied 382 U.S. 873 (1965); N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965); United States v. Zacks, 375 U.S. 59 (1963); Richards v. United States, 369 U.S. 1 (1962).

[4]E.g, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Plumbers, Steamfitters, Refrigeration, Petroleum Fitters And Apprentices of Local 298, A.F. of L. v. Door County, 359 U.S. 354 (1959).

[5]E.g., Linkletter v. Walker, 381 U.S. 618 (1965); Hawkins v. United States, 358 U.S. 74 (1958).

criminal activity. In these respects, the decision of the Sixth Circuit herein is in conflict with the positions adhered to by the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh and District of Columbia Circuits.[6]

Similarly, the Sixth Circuit's opinion regarding the issues relating to impeachment and interfamilial interceptions is in conflict at least with three opinions emanating from Ohio State courts in ruling on the admissibility of intercepted evidence.[7]

Finally, as discussed more fully in the pending Petition, this case presents issues which are vital to the ongoing administration of justice in both the federal and state court systems, in terms of the propriety of various

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[6]See generally, Petitioner's Petition For A Writ Of Certiorari, pages 31-46.

[7]E.g., Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (C.P. Stark Cty., 1974); Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86); Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78).

evidentiary rulings and in terms of the ongoing chilling effect which the Sixth Circuit's decision will have upon zealous advocacy and the right to adequate legal representation.

Respondent, in its Memorandum, does not contest any of those compelling reasons for granting certiorari in the case sub judice. Rather, the government contends that these issues will become moot if Petitioner is retried and acquitted and that these issues may be presented two or three years from now in the event that Petitioner is retried and convicted.

What Respondent conveniently ignores is the fact that this case presents this Court with such a wide spectrum of significant issues as to the scope of the federal wiretap statutes that a decision on merits at this time may eliminate years of uncertainty, conflict and lack of uniformity among the state and lower federal courts.

This case involves substantial and well-defined

issues, developed in the context of a comprehensive evidentiary record and substantial briefing by both sides. Respondent's suggestion that this court refrain from hearing this matter until a second trial and appeal have been completed would do absolutely nothing to present a more developed record to assist this Court in its examination and resolution of these issues. Thus, the factual and legal background of this case provides sufficient concreteness to permit this Court's analysis and resolution of the issues without resort to mere speculation or hypothesis. A second trial will add nothing to the factual and legal basis of this case which would assist this Court in determining the issues presented herein.

Accordingly, for the foregoing reasons, Petitioner respectfully requests that this Court exercise its

discretionary jurisdiction and determine this case on its merits.

Respectfully submitted,

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